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October 16, 2007

**BY FEDERAL EXPRESS PRIORITY OVERNIGHT AND EMAIL**
Susan M. Hudson, Clerk
Vermont Public Service Board
112 State Street (Chittenden Bank Building)
Drawer 20
Montpelier, VT 05620-7701

Re: Docket No. 7270
Joint Petition of Verizon New England, Inc. d/b/a Verizon Vermont, Certain Affiliates Thereof, and FairPoint Communications, Inc. for Approval of an Asset Transfer, Acquisition of Control by Merger and Associated Transactions

Dear Ms. Hudson:

Enclosed please find for filing in the above matter an original and six (6) copies of the public, redacted Initial Brief on behalf of the New England Cable and Telecommunications Association, Inc. ("NECTA") and Comcast Phone of Vermont, LLC ("Comcast Phone").

Please note that NECTA and Comcast Phone have filed a page of the enclosed brief in a sealed envelope marked as confidential in accordance with the terms of the Protective Agreement. This confidential material is being provided to counsel for the Department of Public Service as well.

Copies of this filing are also being delivered by Federal Express to the Department of Public Service. The public, redacted Initial Brief is being emailed to the Board and to parties on the service list.

Please date stamp the enclosed duplicate copy of this transmittal letter for my files. Thank you very much for your assistance. Should the Board have any questions concerning this filing, do not hesitate to contact me.

Sincerely yours,

Alan D. Mandl, *pro hac vice*

Enclosures

cc: Service List
Judy Whitney (w/out copies)

**STATE OF VERMONT**
**PUBLIC SERVICE BOARD**

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|---|---|---|
| Joint Petition of Verizon New England Inc., d/b/a Verizon Vermont, Certain Affiliates Thereof and FairPoint Communications, Inc. for approval of asset transfer, acquisition of control by merger and associated transactions | ) ) ) ) ) | Docket No. 7270 |

# INITIAL BRIEF

**ON BEHALF OF**

**NEW ENGLAND CABLE & TELECOMMUNICATIONS ASSOCIATION, INC. AND COMCAST PHONE OF VERMONT, LLC**

October 17, 2007

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# INTRODUCTION

In this proceeding, Verizon New England, Inc., d/b/a Verizon Vermont and certain of its affiliates ("Verizon") and FairPoint Communications, Inc. ("FairPoint") have requested approval of a series of transactions that would result in the replacement of Verizon Vermont as the principal provider of telecommunications services by a subsidiary and affiliate of FairPoint, FairPoint represented that it would assume all of Verizon's existing responsibilities as an Incumbent Local Exchange Carrier and provide the same or better level of service to Verizon's retail and wholesale customers. FairPoint also represented that it would assume Verizon's existing duties as an owner of utility poles in regard to joint pole owners and third parties that attach to such poles in order to provide cable and other services to Vermont consumers.

Of critical importance is FairPoint's plan to replace existing Verizon back office systems with new systems, FairPoint must select and integrate these systems, obtain data from Verizon to load into these systems and then perform a cutover from Verizon's existing systems to its new systems. At the time of cutover, FairPoint must be staffed, trained and ready to operate and maintain the telecommunications network acquired from Verizon, provide service to retail and wholesale customers and meet all of the obligations that Verizon must meet today.

FairPoint's undertaking involves a number of significant risks, given its small size and capital resources in comparison to those of Verizon, its lack of experience in providing services to interconnecting parties and other wholesale customers and a cutover process similar to the recent failed cutover that occurred in the State of Hawaii. These and other material risks have been acknowledged by FairPoint in its SEC filings and during the course of this proceeding.

Under these unique circumstances, the Board must carefully review the proposed transactions and determine whether Verizon and FairPoint have met their burden of proving that approval of the proposed transactions would promote the public good and not obstruct or impair competition in Vermont.

The New England Cable and Telecommunications Association, Inc. ("NECTA") and Comcast Phone of Vermont, LLC ("Comcast Phone" or "CPVT") intervened in this proceeding in order to assure that, if the Board approves the proposed merger transaction between Verizon and FairPoint, the Board will impose conditions that avoid or mitigate obstructions and impairments of competition, and that mitigate against material risks to competition arising out of the proposed transaction. NECTA and CPVT submit that their proposed conditions also are needed to ensure that the proposed transaction would promote the public good.

FairPoint and Verizon have not met their burden of proving that their proposed merger transaction would promote the public good. Also, there is compelling evidence that the proposed transaction, without appropriate conditions, would obstruct and impair competition within Vermont.

As proposed, the transaction would result in the actual obstruction and impairment of competition in Vermont as well as create material risks of further obstruction and impairment. FairPoint has, among other things:

1) failed to demonstrate that it has the ability to perform the statewide or regional wholesale service obligations now performed by Verizon, given its complete lack of wholesale experience and existing uncertainty whether it will be willing and able to perform these obligations;

2) sought to evade existing ILEC obligations of Verizon, thereby degrading existing, and putting at risk of further degradation, the interconnection rights of competing service providers that would not be jeopardized but for the proposed transaction;

3) proposed to eliminate the existing stability between Verizon and interconnecting carriers that have operated under expired interconnection agreements on a month-to-month basis for periods in excess of one year;

4) refused to provide the same levels of wholesale services offered by Verizon;

5) proposed to degrade the existing level of service received by wholesale customers of Verizon during a "transition period" of at least 5 days and potentially much longer when Verizon data is extracted from Verizon's existing systems and loaded into new, yet to be integrated FairPoint systems;

6) created real and material risks that the cutover by FairPoint to new back office systems will result in service affecting problems for retail and wholesale customers alike, as recently occurred in the State of Hawaii in connection with a Verizon transaction strikingly similar to the present transaction in all important respects;

7) failed to demonstrate that its proposed cutover planning process and cutover itself would promote the public good or avoid the obstruction and impairment of competition;

8) imposed costs, burdens and risks upon competitive service providers due solely to this transaction without providing any compensation to competitive service providers for actual costs incurred or potential losses;

9) proposed an organizational structure that combines retail and wholesale functions by the same personnel and thereby invites anti-competitive conduct;

10) failed to demonstrate readiness to assume responsibility for the licensing and administration of its pole attachment obligations.

NECTA and CPVT take no position on the merits of the Joint Petition in light of other issues to be decided by the Board.[1] However, without inclusion of the safeguards in the form of conditions recommended herein, the proposed transaction would not promote the public good and would obstruct or impair competition.

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[1] These issues include the financial ability of FairPoint to meet all of Verizon's public service obligations, regulatory and legal commitments, FairPoint's ability to make prudent capital expenditures and perform preventative and other plant maintenance, and its ability to provide adequate emergency preparedness. The Board should be seriously concerned about FairPoint' financial, technical and managerial ability to (1) remedy Verizon's existing retail service quality deficiencies, (2) resolve joint pole ownership problems that it would inherit from Verizon (and the dimensions of which are not yet fully understood by FairPoint), (3) make good on Verizon's broadband expansion commitments, (4) serve wholesale customers of Verizon without degrading existing interconnection rights that would exist and remain in place absent the proposed transaction, (5) successfully handle the integration of a full suite of new back office systems or successfully handle the cutover of those systems serving 1.5 million retail and wholesale customers in three states – undertakings without precedent that have never before been accomplished by any company, (6) manage Verizon's existing obligations to pole and conduit attaching entities and (7) meet reasonable conditions sought by the Department of Public Service.

## SUMMARY OF ARGUMENT

NECTA and CPVT recommend that the Board adopt the following merger approval conditions in the event that it finds and rules that the proposed merger should be approved:

1) FairPoint should be prohibited from claiming or seeking, now or in the future, any exemption from ILEC interconnection obligations as a rural telephone company pursuant to 47 U.S.C. §251(f)(1) of the federal Telecommunications Act within the Verizon footprint (or any expanded footprint if FairPoint combines existing "classic FairPoint" operations with existing Verizon operations).

2) FairPoint should be prohibited from claiming or seeking, now or in the future, any suspension or modification of ILEC interconnection obligations as a "2% carrier" pursuant to 47 U.S.C. §251(f)(2) of the federal Telecommunications Act within the Verizon footprint (or any expanded footprint if FairPoint combines existing "classic FairPoint" operations with existing Verizon operations).

3) FairPoint's entitlement to Universal Service Funding should be the same as Verizon's entitlement.

4) FairPoint should be required to offer extensions of the terms of existing interconnection agreements (including expired interconnection agreements that have remained in effect on a month-to-month basis) for a period of three years from the date of merger closing and freeze wholesale rates during that same three year time period.

5) The Board should require FairPoint to retain at its sole expense an independent third party consultant acceptable to the Board. The independent third party should establish testing criteria and conduct testing of FairPoint's new systems, determine the readiness of the systems for cutover, and establish other cutover readiness criteria for FairPoint and report to the Board regarding FairPoint's readiness for cutover, leaving it to the Board to determine whether FairPoint is ready to give Verizon the irrevocable Notice of Readiness for Cutover provided for under the Transition Services Agreement between FairPoint and Verizon. In the alternative, the Board should require FairPoint to retain at its sole expense an independent third party consultant acceptable to the Board, which consultant should (a) provide input regarding, review and audit FairPoint's system testing plans including system acceptance criteria, and system testing results and; (b) establish with FairPoint additional cutover readiness criteria, including, at a minimum, cutover readiness criteria recommended herein by NECTA and CPVT; (c) evaluate FairPoint's readiness for cutover; and (d) report to the Board regarding FairPoint's readiness for cutover, leaving it to the Board to determine whether FairPoint is ready to give Verizon the irrevocable Notice of Readiness for

Cutover provided for under the Transition Services Agreement between FairPoint and Verizon.

6) FairPoint should be required to provide interconnecting parties with levels of service equal to or better than Verizon provides today, including at least the following: (a) number porting intervals and practices; (b) trunk ordering intervals; (c) continued inclusion of tandem transit services as services provided under interconnection agreements; (d) dedicated account managers and account teams (which also may serve this function for more than one interconnecting party); (e) maintenance of a wholesale customer website with content comparable to that provided by Verizon; (f) continuation of a CLEC User Forum; and (g) provision of information on trunking utilization and timely system augmentation, as required under existing interconnection agreements, on a going forward basis.

7) FairPoint must be required to adopt Verizon's pole attachment rates, terms and conditions and maintain existing tariffed pole attachment rates during the term of the incentive rate plan through December 31, 2010, as required under the incentive rate plan.

8) FairPoint must be required to establish a license services administration group ("LSAG") comparable to Verizon's LSAG and adequately staff and train its LSAG both as a merger condition and as a cutover readiness criterion in order to ensure that pole attachment applications, make ready surveys, make ready work, billing and record-keeping will be handled on a timely, reliable, economic and accurate basis.

9) FairPoint should be required to operate a wholesale organization that is separate from its retail organization so that employees serving wholesale customers do not have conflicts of interest and conflicting responsibilities.

10) FairPoint should be required to reimburse wholesale customers of Verizon being transferred to FairPoint for costs that they incur in connection with software, hardware and internal training reasonably required in order to ensure that their systems will be interoperable with the new systems of FairPoint. Such costs shall include, but are not limited to, costs related to e-bonding and point code activity required as a result of this transaction. They should also be reimbursed for losses in the event that there is a material failure at cutover resulting in costs to wholesale customers.

11) The Board should reject FairPoint's request for a waiver of PAP obligations during the 30 day period prior to cutover and the 60 day period following the cutover date.

12) In the event that the Board accords FairPoint the right to seek future recovery through rates of the capitalized portion of Capgemini system development costs, the Board should impose the following conditions: (a) no such filing for rate

recovery should be permitted solely as to wholesale customers; (b) such capital costs must be allocated among and between all jurisdictions and operating systems that benefit from the capitalized work for which rate recognition is being sought; and (c) such capital costs must be allocated to non-regulated services and interstate services.

13) FairPoint shall be precluded from seeking recovery through retail and wholesale rates: (a) expenses incurred under the Transition Services Agreement; (b) expensed Capgemini costs; and (c) any acquisition premium associated with this transaction.

From the standpoint of facilities-based competitors and cable operators, the above merger conditions are the minimum required to assure that the proposed transaction would promote the public good and avoid or mitigate the obstruction and impairment of competition arising out of the proposed transaction.

NECTA and CPVT respect the right of other stakeholders to seek additional conditions they believe are necessary to avoid obstruction or impairment to competition that should apply in the case of any merger approval order. Similarly, the Vermont Department of Public Service ("DPS") has recommended multiple conditions that it believes are necessary. NECTA and CPVT take no position on the adoption of additional conditions recommended by other parties, but reserve their right to address such conditions in their Reply Brief if they conflict with any of their recommended conditions.[2]

[2] NECTA and CPVT reserve the right to request further hearings in the event that any settlements or memoranda of understanding are filed by and between FairPoint and any other party prior to a Board Order in this matter.

# APPLICABLE LEGAL STANDARDS

Under 30 V.S.A. §311, the Board must find that the proposed merger "will not result in obstructing or preventing competition in the purchase or sale of any product, service or commodity, in the sale, purchase or manufacture of which such corporations are engaged." In addition, the Board must find that FairPoint's succession to Verizon's ILEC operations in Vermont "will promote the public good" (30 V.S.A. §107).

The Board has applied these statutory standards in its decisions regarding prior merger transactions, all of which differ in from the proposed merger transaction.[3] In its Order in Docket 5900, dated February 26, 1997, regarding the merger between Bell Atlantic and NYNEX Corporations, the Board identified two kinds of standards to govern its determination whether a proposed merger would promote the public good. First, the Board stated it would apply the types of standards that would apply to a new entrant seeking a certificate of public good. Second, it stated that it would consider concerns that arise from the merger, primarily because of the possible effects of the proposed transaction upon competition. The Board then delineated fifteen factors to be examined in determining whether a proposed merger would promote the public good:

1) legal authority
2) availability of emergency services

[3] For example, the analysis to be conducted in this case under 30 V.S.A. §311 is not identical to the analysis conducted by the Board when the question was whether the merging companies were not actual competitors in the relevant market, but might become competitors. *See,* e.g., *Joint Petition for Approval of Waitsfield-Fayston Telephone Company, Inc., and Champlain valley Telecom, Inc,* Docket No. 6171 (December 14, 1998). Unlike other asset sales that do not risk undue inconvenience to existing customers or interruptions in service(*Joint Petition of Matrix Telecom , Inc. and Global Crossing Telecommunications, Inc. for Approval of Sale of Assets,* Docket No. 7061 (May 4, 2005)), the proposed transaction creates not only actual, but also material risks of substantially greater undue inconvenience and interruptions in service, as a result of the substitution of FairPoint for Verizon as an ILEC and the replacement of Verizon's systems by new systems.

3) compatibility of the system with neighboring systems

4) just and reasonable terms and conditions of service

5) adequate service quality standards

6) adequate customer service, including the processing of customer complaints

7) the quality of facilities must be adequate

8) the rate of investment must be adequate to provide the contemplated services

9) the company must be financially stable

10) the company must take satisfactory steps to control affiliate interests

11) management must be competent

12) the company must have the technical knowledge, experience and ability to provide the intended services

13) the owner must have a good business reputation

14) the merger should produce efficiencies in providing service

15) the merger should not obstruct or impair competition

The Board identified these factors in more recent merger cases, such as Docket 6150, involving the joint petition for a merger between Bell Atlantic and GTE Corporation. In its September 13, 1999 Order in Docket 6150 at page 48, the Board clarified that the fifteen factors first listed in Docket 5900 are considerations to be taken into account rather than independent criteria in determining whether a proposed merger transaction will "promote the public good."

The Board stated at page 48 that these various factors should be considered and balanced, but that none, by itself, is conclusive for or against a merger application. The Board further clarified at pages 48-49 that five factors are of primary concern in determining whether the proposed transaction will "promote the public good":

1) whether the new organization will be technically competent;
2) whether the new organization will be financially sound;
3) whether the new organization will act as a fair partner in business transactions with the citizens of Vermont;
4) whether the merger will result in efficiencies that benefit consumers; and
5) whether the proposed transaction will obstruct or impair competition, similar to the inquiry under 30 V.S.A. §311.

The Board routinely has imposed conditions upon its approval of merger transactions in order to assure that a proposed transaction promotes the public good and in order mitigate against risks that a proposed transaction would obstruct or impair competition. *Re Verizon Communications, Inc.*, Docket No. 7056 (Nov. 29, 2005)(imposition of conditions regarding Verizon-MCI merger to ensure that the merger would not obstruct or impair competition for mass market services). The Board also considers in its public good analysis whether a proposed transaction will obstruct or impair competition. If a proposed transaction would obstruct or impair competition in Vermont, the proposed transaction, in turn, would not promote the public good. *Re Bell Atlantic Communications*, Docket No. 6150 (Sept. 13, 1999).

# ARGUMENT

## I. FAIRPOINT SHOULD NOT BE ENTITLED TO CLAIM OR SEEK ANY EXEMPTION FROM ILEC INTERCONNECTION OBLIGATIONS AS A RURAL TELEPHONE COMPANY PURSUANT TO 47 U.S.C. §251(f)(1) OF THE FEDERAL TELECOMMUNICATIONS ACT WITHIN THE VERIZON FOOTPRINT (OR ANY EXPANDED FOOTPRINT IF FAIRPOINT COMBINES EXISTING "CLASSIC FAIRPOINT" OPERATIONS WITH EXISTING VERIZON OPERATIONS),

### A. FINDINGS OF FACT[4]

1. Verizon is a Bell Operating Company and operates within the State of Vermont as an Incumbent Local Exchange Carrier ("ILEC") (Tr. 9/7/07 at 11:19-25).

2. Verizon is not a rural telephone company within the service territory that it proposes to cede to FairPoint and is not entitled to claim an exemption from ILEC interconnection obligations pursuant to Section 251(f)(1) of the Telecommunications Act (Tr. 9/7/07 at 12:1-4).

3. FairPoint has testified that it will not seek an exemption from ILEC interconnection obligations within the Verizon footprint as a rural telephone company pursuant to Section 251(f)(1) of the Telecommunications Act (Nixon Direct at 28:7-13; Exhibit NECTA/CPVT-MDP-13).

4. FairPoint has stated that it will not seek to divide the acquired Verizon territory into small companies that would individually qualify a rural telephone companies for purposes of seeking rural telephone company exemptions pursuant to 47 U.S.C. §251(f)(1) (Nixon Direct at 33:18-22; Tr. 9/19/07 at 220:4-23).

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[4] NECTA and CPVT have grouped findings of fact under each separate section of argument.

5. Several witnesses have testified that the Board should condition any merger approval order upon FairPoint's not claiming or seeking a rural carrier exemption from interconnection obligations pursuant to Section 251(f)(1) of the Telecommunications Act (Lafferty Direct at 32; Lafferty Surrebuttal at 5; Ball Direct at 24, 30; Pelcovits Direct at 28, 29).

6. If FairPoint were permitted to claim and seek a rural telephone company exemption from ILEC interconnection obligations that now apply to Verizon and would apply to Verizon absent the proposed transaction, existing interconnection arrangements would be obstructed and impaired, as would competition. The cost and uncertainty caused by such a claim or attempt would obstruct and impair competition (Pelcovits Direct at 27-29).

## B. DISCUSSION

FairPoint has stated that it will not claim or seek rural telephone company status for purposes of seeking an exemption from ILEC interconnection obligations pursuant to Section 251(f)(1) of the Telecommunications Act, as amended (Nixon Direct at 28:7-13). FairPoint also has agreed that it will not restructure the acquired Verizon territory into separate entities that might qualify as rural telephone companies in order to circumvent its commitment not to seek exemptions as a rural telephone company within the current Verizon footprint that it proposes to acquire (Nixon Direct at 33:18-22; Tr. 9/19/07 at 220:4-23). The Verizon footprint historically has never been subject to a rural telephone company exemption and any attempt by FairPoint to undo the status quo would set back existing and future competition in that footprint (Pelcovits Direct at 27-29).[5]

[5] NECTA and CPVT do not object to the "classic FairPoint" systems retaining any existing rural telephone company exemption at closing and prior to their combination with the Verizon Vermont footprint being acquired by FairPoint, but reserve their right to petition the Board to remove such exemption pursuant to 47 U.S.C. §251(f)(1).

The Board should require FairPoint's above commitments as merger approval conditions in order to lend certainty to FairPoint's assumption of the existing regulatory obligations of Verizon and enable enforcement of FairPoint's commitments. Absent this requirement as an enforceable merger condition, competition would be obstructed and impaired.

## II. FAIRPOINT SHOULD NOT BE ENTITLED TO SEEK ANY SUSPENSION OR MODIFICATION OF ILEC INTERCONNECTION OBLIGATIONS AS A "2% CARRIER" PURSUANT TO 47 U.S.C. §251(f)(2) OF THE FEDERAL TELECOMMUNICATIONS ACT WITHIN THE VERIZON FOOTPRINT (OR ANY EXPANDED FOOTPRINT IF FAIRPOINT COMBINES EXISTING "CLASSIC FAIRPOINT" OPERATIONS WITH EXISTING VERIZON OPERATIONS).

### A. FINDINGS OF FACT

7. Verizon in the aggregate has more than 2% of the nation's subscriber lines (Tr. 9/7/07 at 12:5-7) and Verizon Vermont is not a carrier entitled to seek suspensions or modifications of its Section 251 ILEC interconnection obligations pursuant to Section 251(f)(2) of the Telecommunications Act. (Pelcovits Rebuttal at 6-7).

8. FairPoint originally testified that it would not seek suspensions or modifications of Section 251 ILEC interconnection obligations pursuant to 47 U.S.C. §251(f)(2) of the Telecommunications Act. (Nixon Direct at 28:7-13):

> FairPoint will not take the position that this company is a rural telephone Company entitled to…suspension or modification of Section 251(b) or to (c) obligations under Section 251(f) (2) of the Communications Act.

9. In rebuttal testimony, FairPoint changed its position and proposed to reserve the right to seek suspensions or modifications of Section 251 ILEC interconnection obligations pursuant to 47 U.S.C. §251(f)(2) of the Telecommunications Act (Skrivan Rebuttal at 26, 27).

10. FairPoint would qualify as a "2 % carrier" entitled to seek suspensions or modifications of Section 251 ILEC interconnection obligations pursuant to 47 U.S.C. §251(f)(2) of the Telecommunications Act, absent a merger approval condition requiring it to not to seek such suspensions or modifications (Skrivan Rebuttal at 26, 27).

11. The Department's witness Mr. Lafferty, Sovernet/SegTel witness Mr. Ball and NECTA/CPVT witness Dr. Pelcovits all have explained that FairPoint should not be allowed to freedom to seek suspensions or modifications of ILEC interconnection obligations that Verizon cannot seek today (e.g., Pelcovits Direct at 27-29; Pelcovits Rebuttal at 3-4, 6-7; Lafferty Direct at 40:15-17; Lafferty Surrebuttal at 13, 14; Ball Surrebuttal at 4,5).

12. Even the possibility that in the future FairPoint could petition the Board for a suspension or modification of its interconnection obligations as an ILEC under Section 251(f)(2) leaves competitors worse off than they would be if no transaction were to occur and provides FairPoint with undue leverage in future interconnection negotiations. (Pelcovits Rebuttal at 7:3-10).

## B. DISCUSSION

The Board must prohibit FairPoint from seeking any suspension or modification of ILEC interconnection obligations under Section 251 pursuant to Section 251(f)(2) of the Telecommunications Act, as amended, as condition any approval of the proposed merger transaction. FairPoint has back-pedaled on Mr. Nixon's original commitment that FairPoint would not seek any suspension or modification of ILEC interconnection obligations pursuant to

Section 251(f)(2). Therefore, this condition is critical in order to assure that FairPoint "steps into the shoes" of Verizon for purposes of its regulatory obligations.[6]

Mr. Skrivan's position is contrary to FairPoint's previous statements regarding its obligations pursuant to 251(c), made by Mr. Nixon at page 28 of his direct testimony. Moreover, Mr. Skrivan's back-pedaling also is inconsistent with his own discovery answer that "FairPoint has agreed in this proceeding to accept the same level of regulation that governs Verizon's existing obligations in Vermont..." (Exhibit NECTA/CPVT-MDP-4R).

Verizon's Replacement of FairPoint as the principal ILEC in Vermont should not, in any respect, erode the interconnection rights upon which competitors depend. Such an erosion would not occur absent the proposed transaction and would be harmful to competition in Vermont. What little competition exists in Vermont today depends upon the ILEC performing its interconnection obligations. Continued growth in competition requires that interconnecting parties retain the level of interconnection services that would be obtainable from Verizon absent this transaction, under reasonable rates, terms and conditions (Pelcovits Direct at 24-29; Pelcovits Rebuttal at 6-7).

Even the *possibility* that FairPoint could petition the Board for a suspension or modification of its interconnection obligations as an ILEC leaves competitors worse off than they would be if no transaction were to occur and would provide FairPoint leverage in future

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[6] Skrivan Rebuttal at 26, 27. Exhibit NECTA/CPVT-4R.

interconnection negotiations.[7] The costs and uncertainty of such potential litigation alone might well lead to a contraction of competitive presence in Vermont, without regard to the ultimate resolution of the litigation by the Board. Smaller CLECs might not have the resources to contest suspension or modification requests by FairPoint and would then be disadvantaged if their existing interconnection arrangements eroded as a result of Section 251(f)(2) proceedings. (Pelcovits Direct at 28:9-17).

The Board must remember that as long as Verizon is the ILEC, the ILEC cannot seek suspensions or modifications of ILEC interconnection obligations under 251(f)(2). In order to avoid a significant erosion of competitors' existing and future interconnection rights, the Board must adopt a merger condition that precludes FairPoint from seeking suspension or modification of its Section 251 obligations pursuant to Section 251(f)(2) of the Telecommunications Act now

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[7] The fact that the Board would need to approve any requested suspension or modification of ILEC interconnection obligations pursuant to Section 251(f)(2) after a petition by FairPoint provides no solace to interconnecting parties, given that the need for such proceedings and the risks to competition that they represent would not exist in the absence of the proposed transaction. Any Section 251(f)(2) proceeding would be costly and burdensome for FairPoint, affected wholesale carriers that have been operating under interconnection agreements with Verizon, public parties like DPS that have a keen interest in promoting competition within Vermont and even FairPoint. FairPoint itself has opposed rural telephone company efforts to seek both exemptions from interconnection obligations as well as suspensions or modifications of such obligations pursuant to Sections 251(f)(1) and 251(f)(2), respectively. In New York Public Service Commission Case 99-C-1337 (*Petition of FairPoint Communications Corp, for Negotiation/Mediation Pursuant to Section 252(a) of the Telecommunications Act of 1996 and for Approval of any Resulting Interconnection Agreement*) (Order issued and effective June 6, 2000), FairPoint engaged in lengthy and costly proceedings to challenge a rural telephone company's claims for an exemption under Section 251(f)(1) and for a suspension or modification under Section 251(f)(2) of the Telecommunications Act. FairPoint's bona fide request was made on September 23, 1999. FairPoint had no trouble challenging the rural telephone company's TELRIC study and resulting rates, leading to an order that a separate proceeding be initiated to review and establish TELRIC rates to be prepared by the rural telephone company, with a TELRIC cost study to be filed no later than September 1, 2000, nearly one year after its petition was filed. In another apparent contradiction by FairPoint, Mr. Skrivan has suggested that the filing of TELRIC studies is an example of an ILEC obligation that might be found too burdensome for FairPoint even though FairPoint advocated that a rural telephone company be required to perform TELRIC studies (Skrivan Rebuttal at 27). This type of inconsistent behavior instills no confidence in how FairPoint would act as a successor or assign of Verizon, if it allowed by the Board to file petitions to evade existing ILEC interconnection obligations that would exist in the absence of this transaction or a merger approval condition barring such petitions.

or any time in the future (in the exchange territories now served by Verizon or in any existing FairPoint service areas if they are combined with the Verizon footprint). (Pelcovits Rebuttal at 7:3-10).

## III. AS A CONDITION FOR APPROVAL OF THE PROPOSED MERGER TRANSACTION, FAIRPOINT SHOULD BE HELD TO ITS COMMITMENT THAT IT WILL BE ENTITLED TO NO MORE UNIVERSAL SERVICE FUNDING THAN VERIZON WOULD HAVE BEEN ENTITLED IN THE ABSENCE OF THIS TRANSACTION

### A. FINDINGS OF FACT

13. FairPoint has testified that it expects to receive High Cost Fund support for the acquired Verizon properties on the same basis as Verizon (Nixon Direct at 32:2-3).

14. FairPoint also testified that under the FCC's rules in 47 C.F.R. Sections 54.309 and 54.801(d), FairPoint will be eligible to receive the same amount of non-rural high-cost loop support and interstate access support as Verizon would be eligible to receive (Nixon Direct at 32:3-5).

15. FairPoint's financial analysis does not assume growth in high cost fund support (Nixon Direct at 32:9-10).

### B. DISCUSSION

Mr. Nixon testified that FairPoint would receive the same High Cost Fund support that Verizon receives today. In order to assure that this commitment is kept, the Board should condition any approval of the proposed merger upon FairPoint's receiving the same High Cost Fund Support that Verizon would have received.[8]

## IV. IN ORDER TO AVOID OBSTRUCTION OR IMPAIRMENT OF COMPETITION AND TO PROMOTE THE PUBLIC GOOD, THE PROPOSED MERGER TRANSACTION SHOULD BE CONDITIONED UPON A THREE-YEAR EXTENSION OF EXISTING INTERCONNECTION AGREEMENTS, AND A THREE -YEAR RATE WHOLESALE FREEZE

### A. FINDINGS OF FACT

16. Verizon has entered into interconnection agreements ("ICAs") with wholesale customers in Vermont (Pelcovits Direct at 30; Exhibit NECTA/CPVT Cross-54).

17. In many instances where the original term of an interconnection agreement has expired, Verizon and the wholesale customer have operated under the same rates, terms and conditions on a month-to-month basis (Pelcovits Direct at 32:18-19, 33:1-4).

18. Verizon has a documented history of allowing expired interconnection agreements to remain in effect on a month-to-month basis for years (Pelcovits Direct at 32:18-19, 33:1-4; Pelcovits Rebuttal Testimony at 5; Tr.9/19/07 at 126:17-25, 127:1-25).

19. Verizon's interconnection agreements with its wholesale customers are expected to be assigned to FairPoint, following consents to assignments where required, at the time of merger closing (Tr. 9/7/07 at 12-13).

[8] Mr. Nixon has testified that FairPoint would like to divert high costs funds to underwrite its broadband expansion plans (Tr. 9/19/07 at 8:9-14). This issue is outside the scope of this proceeding. Mr. Nixon was not familiar with the process required to enable such a diversion (Tr. 9/19/07 at 8:23-25, 9:1-3). Any such diversion would require legislative action. 30 V.S.A. §§7511, 7515. It also is not clear that such a diversion would comply with 47 U.S.C. §254(k), given the competitive nature of broadband services.

20. Comcast's limited experience in seeking interconnection arrangements from "classic" FairPoint in Washington State has been unsatisfactory (Pelcovits Direct at 33-34; Pelcovits Rebuttal at 39; Exhibit NECTA/CPVT-MDP-14).

21. Existing wholesale customers of Verizon have no working experience with FairPoint and FairPoint has no working experience as a provider of wholesale services on a mass market or other basis on the scale that Verizon has experience providing (Exhibit NECTA/CPVT-MDP-8R).

22. The negotiation and arbitration of interconnection arrangements would be time-consuming, costly and resource intensive from the standpoint of both FairPoint and interconnecting customers and impose risks of changes in well-established prices, terms and conditions (Tr. 9/19/07 at 128:18-25, 129:1-13).

23. A period of stability as between FairPoint and wholesale customers in terms of wholesale rates, terms and conditions would allow FairPoint to concentrate its resources on developing its new retail and wholesale operations and meeting resource-intensive commitments for broadband expansion, retail quality of service improvements and the resolution of overdue outside plant problems, such as double-poles (Pelcovits Direct at 35:11-18, 36:1-2).

24. FairPoint has proposed to extend the terms of existing interconnection agreements for a period of one year and to extend expired agreements that have remained in effect on a month-to-month basis for a period of one year from the date of closing (Lippold Rebuttal at 22; Pelcovits Rebuttal at 4:11-16).

25. Mr. Ball and Dr. Pelcovits have recommended that FairPoint be required to extend the rates and terms of interconnection agreements for three years from the date of merger closing (Ball Direct at 7, 29; Pelcovits Direct at 35:11-18, 36:1-2).

26. Dr. Pelcovits explained that the one-year extension of interconnection agreements proposed by FairPoint is inadequate and does not avoid the obstruction or impairment of competition or promote the public good (Pelcovits Rebuttal at 4, 5).

27. If extended by only one year as proposed by FairPoint, the month-to-month interconnection agreements would expire only six months after the expected cutover date in May 2008, when further system work by Capgemini will remain to be performed and completed as part of the "final release" expected by FairPoint to occur six months after the cutover date (Pelcovits Rebuttal at 5:13-17; Exhibit NECTA/CPVT-MDP-2R).

28. Under the current FairPoint cutover planning timeline, four months of the one-year extension period will have expired at the time of cutover and ten months of the one-year extension period will have expired at the time currently scheduled for completion of Capgemini work (the "final release" date) (Pelcovits Rebuttal at 5:13-20).

29. Verizon has made broadband expansion commitments pursuant to the amended incentive regulation plan that FairPoint has agreed to assume (Nixon Direct at 24, 25; Harrington Direct at 3:6-10).

30. Verizon has experienced retail quality of services issues in Vermont, according to Department of Public Service staff testimony (Pariseau Direct at 2-4, 6-8).

31. FairPoint has requested a multi-year time frame to address retail quality of service issues that exist today in Vermont and proposed to submit of a plan to address these problems six months after the merger closing (Tr. 9/21/07 at 14:17-23).

32. Verizon has experienced disputes with electric company joint pole owners over matters such as the sharing of tree trimming expenses, timeliness of pole change-outs and removal of double poles (Hallquist Direct; Exhibit VEC-1).

33. FairPoint has made numerous commitments to the Board to carry out existing obligations of Verizon or do better than Verizon with regard to such obligations, including, but not limited to, broadband expansion commitments, retail service quality improvement commitments, and commitments to resolve double pole and tree trimming issues with the Department and joint pole owners (Nixon Rebuttal at 28, 34-38; Nixon Direct at 24, 25; Harrington Direct at 3:6-10).

34. FairPoint regards the above commitments to the Board as high priority items (Tr. 9/21/07 at 15:12-20).

35. FairPoint has proposed that it be given 42 months from the date of merger closing to address existing double-pole problems that have been a concern of DPS and joint pole owners (Exhibit VEC-1 Tr. 9/20/07 at 60:9-24, 65:23-25, 66:1-22).

36. DPS has proposed that the Board require FairPoint to satisfy a number of merger conditions, many of which require compliance by FairPoint within one year after the merger closing date (Exhibit CJC-5; Tr. 9/21/07 at 163-165).

37. FairPoint's financial models for this transaction did not assume wholesale rate increases during a 5 year period commencing in 2008 (Tr. 9/5/07 at 132, 9/21/07 at 16:13-17; Leach Direct at 37).

38. Mr. Leach testified that although he was uncertain, he could think of no situation in which FairPoint would seek wholesale rate increases in advance of seeking retail rate increases (Tr. 9/5/07 at 133).

39. Revenues derived from interconnection services that FairPoint will provide after closing represent a very small fraction of the total ILEC revenues that FairPoint expects upon and after closing over a five-year period (Exhibit DPS-PLW-2).[9]

## B. DISCUSSION

### 1. The One-Year Interconnection agreement extensions proposed by FairPoint are less favorable than Verizon's actual track record

FairPoint has proposed to extend the terms of existing interconnection agreements for a period of one year and to extend expired agreements that have remained in effect on a month-to-month basis for a period of one year from the date of closing (Lippold Rebuttal at 22; Pelcovits Rebuttal at 4:11-16). However, a one-year extension from merger closing is inadequate from any vantage point. It would not promote the public good and would – under the unique and difficult circumstances within one year after merger closing – actually obstruct and impair competition.

A Board condition requiring a three-year extension of existing interconnection agreement terms (and a three-year extension from date of merger closing for those expired agreements that have remained in effect on a month-to-month basis for long periods of time) is needed to assure that the proposed transaction promotes the public good and does not obstruct or impair competition. A three-year extension also is in keeping with Verizon's track record regarding its interconnection agreements. Such a condition would help ensure that FairPoint adheres to the

[9] 2008 standalone Spinco LEC revenues were projected at **[begin confidential]** [redacted] **[end confidential]**. 2008 projected revenues from interconnection services were **[begin confidential** [redacted] **[end confidential]**. The bulk of wholesale revenues are attributable to **[begin confidential]** [redacted] **[end confidential]**, some portions of which are frozen under the incentive regulation plan. Inclusion of unbundling revenues would still make the revenues from interconnection services and unbundling less than **[begin confidential]** [redacted] **[end confidential]** of total Spinco LEC revenues.

interconnection rates, terms and conditions that now apply to Verizon (Pelcovits Direct at 35-36; Tr. 9/19/07 at 126:17-25, 127:1-25).

The ability of wholesale customers to compete would be impaired if FairPoint abandoned Verizon's actual practice of allowing interconnection agreement rates and terms to remain in effect for years on a month-to-month basis after the expiration dates, as expressly contemplated by the ICAs (Exhibit NECTA/CPVT Cross-54). Such action by FairPoint would precipitate costly and resource intensive interconnection agreement negotiations, arbitrations and wholesale rate proceedings within one year after closing - before cutover even occurs - and without regard to whether service affecting problems arise as a result of the cutover (Tr. 9/19/07 at 126:9-16).

Contrary to FairPoint's statements, the one-year extension that it has proposed represents a major step backward in relation to Verizon's actual practices. Moreover, FairPoint has not committed to maintaining the existing wholesale rates of Verizon during this one year period (Exhibit NECTA/CPVT-MDP-3R). The one-year extension proposed by FairPoint is inadequate to offset the obstructions and impairments of competition that result from this transaction, even if the cutover goes smoothly.

### 2. Three-Year Interconnection Agreement Extensions Are Needed to Mitigate the Known Obstructions and Impairments of Competition Arising Out of the Proposed Transaction

Mr. Ball and Dr. Pelcovits have recommended that the Board require FairPoint to extend the rates and terms of interconnection agreements for three years from the date of merger closing (Ball Direct at 7, 29; Pelcovits Direct at 35:11-18, 36:1-2). Three-year extensions are necessary to provide stability between competitors while FairPoint learns to operate its new back office systems and Verizon's network (Pelcovits Direct at 35:15-18). In addition, three-year extensions will reduce some of the potential impairments to competition that will arise from the proposed transaction.

First, requiring a three-year extension would promote the public good by better assuring that FairPoint will concentrate its resources on meeting critical commitments made to the Board and conditions recommended by the Vermont Department of Public Service ("DPS" or "Department") (Tr. 9/21/07 at 166:1-18). A three-year interconnection agreement extension would better enable FairPoint to "gets its arms around" the Verizon operations that it would be taking over in the event that its proposed merger transaction is approved.[10] It would also enable FairPoint to focus and allocate its resources to the multiple commitments made to the Board to meet and exceed Verizon's performance in several areas that are of critical importance to the public good, including (1) broadband expansion, (2) retail service quality and (3) commitments to cure double poles and other safety issues raised by joint pole owning electric companies and DPS witnesses.

FairPoint's one-year year extension proposal also squarely conflicts with multiple merger conditions that DPS has recommended. DPS witness Campbell summarized merger conditions being requested by DPS, several of which would require intensive work efforts by FairPoint within one year after closing, the same period of time during which FairPoint also may be dealing with cutover-related problems (Tr. Exhibit DPS-CJC-5, Tr. 9/21/07 at 163-165).

As Mr. Campbell testified, it would not serve the public good to have FairPoint's resources diverted to interconnection agreement negotiations, arbitrations and rate proceedings when there are more critical matters at hand that FairPoint should be addressing to meet state

[10] For example, the extent of the historic double-pole problem that FairPoint has agreed to address remains unknown and new demands will be placed on FairPoint to avoid exacerbating the historic problem (Tr. 9/20/07 at 66:11-22; 79:1-12; 80: 2-16, 24-25).

broadband deployment goals (and incentive rate plan obligations), fix existing retail quality of service problems and fix long overdue issues relating to double poles (Tr. 9/21/07 at 166-167).

Given that FairPoint itself has requested three years or longer to address each of these critical, high priority service affecting and public safety issues (e.g., Exhibit VEC-1, incentive regulation plan broadband expansion commitments), the public good can best be achieved by crafting conditions that direct FairPoint's resources to these matters and avoid the diversion of these resources to burdensome ICA negotiations and arbitrations.

Second, given the lack of *any* track record between the newly created FairPoint wholesale operation and wholesale customers, a three-year interval for the development of working relationships - without the complications, cost and resource burdens of interconnection negotiations and arbitrations - would be constructive for all stakeholders. As discussed more fully below, FairPoint's competitors face many risks as a result of this transaction, including the risks that (1) FairPoint's new back office systems will not function as planned, (2) competitors' orders could be delayed or not be processed at all during the cutover transition period and that FairPoint's contingency plans (yet to be developed) will not function properly; and (3) FairPoint's wholesale services organization will not be adequately staffed and trained.

Under these circumstances, a three-year extension[11] of existing interconnection terms, rates and conditions is needed in order to promote the public good and avoid or mitigate against obstruction and impairment of competition stemming from FairPoint's replacement of Verizon's systems and wholesale service operations. Moreover, a three-year extension is consistent with a

[11] The three-year interconnection extension and rate freeze condition recommended by NECTA and CPVT would not prevent willing carriers from negotiating specific amendments to their interconnection agreements with FairPoint . At the same time, other carriers may prefer to develop working relationships with FairPoint engage in cooperative discussions regarding their specific needs (such as trunk order sizes and mid span meets) and defer costly and time-consuming ICA negotiations, arbitrations and rate proceedings for a reasonable length of time, consistent with the track record that has existed with Verizon.

condition required by the FCC in its approval of the AT&T-BellSouth merger.[12] In both instances, ICA extensions mitigate against the well-documented risks of competitive harms.

### 3. A Three Year ICA Extension and Wholesale Rate Freeze Would Not Harm FairPoint

The record is also clear - a three year ICA extension and wholesale rate freeze recommended by Dr. Pelcovits and Mr. Ball would not harm FairPoint, and is of minimal financial impact.

First, Mr. Leach has testified that the financial model relied upon by FairPoint does not assume any increases in existing Verizon rates - including wholesale rates - for at least a 5 year study period (Leach Direct at 37; Tr. 9/5/07 a7 132; Tr. 9/21/07 at 16:13-17). Further, Mr. Leach testified that he could not think of any circumstances under which FairPoint would increase wholesale rates during the period of time that its retail rates are generally frozen under the incentive regulation plan through December 31, 2010 (Tr. 9/5/07 at 133). Thus, the proposed transaction does not assume or rely upon increases in rates for interconnection services.

Second, because the revenues derived from interconnection services and unbundling represent a small fraction of the total LEC revenues that the acquired operations are projected to generate, a three year rate freeze applicable to these services would not appear to have any material impact on FairPoint. The amount of revenues that FairPoint would generate from rate filings to increase interconnection service rates and rates for unbundled network elements, if any,

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12 *In the Matter of Review of AT&T Inc. and BellSouth Corporation Application For Transfer of Control, Memorandum of Opinion and Order,* WC Docket No. 06-74, *Adopted* December 29, 2006, Appendix F, p.150

is negligible to FairPoint and would be offset by the high costs of contested rate proceedings (Tr. 9/20/07 at 287:8-15).[13]

Third, FairPoint has maintained that it expects it cost structure to be less expensive than Verizon's cost structure today (Tr. 9/20/07 at 287:16-20); thus, the need for an increase in rates charged to interconnecting carriers (during a three year period of time when FairPoint has agreed or is required to freeze tariffed rates) is very doubtful.

For these reasons and the reasons above, there is a cumulative basis for the Board to find and rule that any merger approval be conditioned upon a three year extension of existing interconnection agreements, a three year extension from date of closing for those interconnection agreements that have remained in effect on a month-to-month basis, and a concurrent wholesale rate freeze.

## V. AS A CONDITION FOR APPROVAL OF THE PROPOSED MERGER TRANSACTION, THE BOARD MUST REQUIRE THAT AN INDEPENDENT THIRD PARTY CONSULTANT, SATISFACTORY TO THE BOARD AND PAID FOR BY FAIRPOINT, BE RETAINED TO ASSESS AND REPORT TO THE BOARD REGARDING THE READINESS OF FAIRPOINT FOR CUTOVER, WITH THE BOARD RETAINING AUTHORITY TO DETERMINE THE READINESS OF FAIRPOINT FOR CUTOVER

### A. FINDINGS OF FACT

#### 1. TSA/Merger Agreement

40. Verizon and FairPoint entered into an Agreement and Plan of Merger

13 While Mr. Lafferty was comfortable with FairPoint's one- year extension proposals, he testified that he would be equally comfortable with the three- year extension proposals recommended by Dr. Pelcovits and Mr. Ball as long as parties had the option to negotiate within that three year period (Tr.9/20/07 at 287:23-25 and 288:1-7).

dated January 15, 2007 ("Merger Agreement") (Verizon Exhibit 1).

41. The Merger Agreement contemplated and required a series of related agreements between Verizon and FairPoint defined as "Transaction Agreements" under Article 1.192, among which is a Transition Services Agreement (Verizon Exhibit 4).

41. The Transition Services Agreement ("TSA") requires Verizon to provide and FairPoint to pay for "Transition Services" that will be provided by a Verizon affiliate to FairPoint following the closing (Verizon Exhibit 4 at Article 2.1, pages 5-6).

42. During the first eight months after the merger closing date, the charges by Verizon to FairPoint for "Schedule A Services" (as defined in the TSA) are $14.2 million per month. Beginning in the 9$^{th}$ month after closing, the monthly Schedule A Services charges are $500,000 less than for the prior month. For the 13$^{th}$ month, the monthly charge increases to $14.7 million. For each month after the 13$^{th}$ month until termination of the Schedule A Services, the monthly charges are $500,000 more than the amount paid for the prior month. For example, in the 14$^{th}$ month the Schedule A Services TSA payment would be $15.2 million (Verizon Exhibit 4 at page 6, the TSA).

43. Additional fees apply for Schedule B Services, Schedule C Fees and Schedule D Services as defined in the TSA (Verizon Exhibit 4, TSA at 6 ,7).

44. FairPoint has publicly disclosed in SEC filings that it expects the aggregate TSA payments to Verizon during the first six months after closing to be approximately $132.9 million (Exhibit NECTA/CPVT-MDP-8R at 26).

45. FairPoint has further disclosed in SEC filings that if TSA services were required for 12 months following the merger, the aggregate TSA fees would be approximately $226.9 million (Exhibit NECTA/CPVT-MDP-8R at 26).

46. The TSA requires Verizon to prepare a Cutover Plan (Verizon Exhibit 4, TSA at 11).

47. The Cutover Plan describes, among other things, the steps that Verizon will take to transfer data and information for FairPoint (Verizon Exhibit 4, TSA at 11).

48. The TSA requires FairPoint to prepare a FairPoint Cutover Preparation Task List. The FairPoint Cutover Preparation Task List includes, among other things, a suggested cutover date, a list of activities and tasks related to pre-cutover acceptance, testing and processing of Verizon data extracts and a list of activities to establish FairPoint systems and processes in order to allow FairPoint to function independent of Verizon (Verizon Exhibit 4, TSA at 12).

49. The Cutover Task List is an evolving document subject to updating, no final version having been provided (Exhibit NECTA/CPVT-MDP-12R).

50. FairPoint did not provide its cutover readiness criteria to all parties (Exhibit NECTA/CPVT-MDP-13R).

51. FairPoint entered into a Master Services Agreement in January 2007 with Capgemini, a large consulting firm with experience in the telecommunications industry, but which had never attempted the development and integration of an entire suite of back office systems needed to provide ILEC telecommunications on the three-state, 1.5 million access line scale contemplated by the Merger Agreement and TSA (Tr. 9/19/07 at 17:6-11, 217:15-21).

52. The TSA further provides that FairPoint may deliver to Verizon an irrevocable "Notice of Readiness for Cutover," which shall include a representation to the effect that FairPoint has made arrangements to operate the acquired Verizon operations without any transition services from Verizon or has engaged a third party to provide such services.(Verizon Exhibit 4, TSA at 20, 21).

53. Upon receipt of such a notice from FairPoint, Verizon is required within 10 days to provide FairPoint with a "Cutover Date Notice" identifying the specific date for Cutover and termination of transition services. The Cutover Date must be no earlier than 50 days nor later than 90 days after "Notice Effective Date" of the irrevocable "Notice of Readiness for Cutover" (Verizon Exhibit 4, TSA at 22).

54. In order to achieve a planned Cutover Date of May 31, 2008, FairPoint would need to provide Verizon with the irrevocable "Notice of Readiness for Cutover" 60-90 days prior to the Cutover Date, or as early as February 28, 2008, and no later than March 31, 2008, 1-2 months after the January 31, 2008 target date for merger closing (Tr. 9/7/07 at 17: 6-21; Verizon Exhibit 4, Article 13.2).

55. Once the irrevocable Notice of Readiness for Cutover is given by FairPoint, Verizon would begin extensive preparations for cutover, and Verizon is not prepared to back up and start running its systems again once it has begun its preparations (Tr. 9/7/07 at 18: 5-12).

56. The Master Services Agreement with Capgemini provides that Capgemini will provide system improvements and enhancements during a six-month period following the Cutover Date and the Final Release Date (Tr. 9/18/07 at 165:15-25, 166:4-9; Exhibit NECTA/CPVT-MDP-2R).

57. Verizon is under no contractual obligation to assure that FairPoint's systems are ready for cutover and will function properly (Exhibit NECTA/CPVT Cross-5).

### 2. Risk Factors

58. FairPoint has made disclosures in SEC filings that among the risk factors associated with its Merger Agreement, "The integration of FairPoint's and Spinco's businesses

may present significant systems integration risks, including risks associated with the ability to integrate Spinco's customer sales, service and support operations into FairPoint's customer care, service delivery and network monitoring and maintenance platforms" (Exhibit NECTA/CPVT-MDP-8R at 26).

59. FairPoint has further identified as a material risk "the inability or failure of FairPoint and Capgemini to implement successfully their plans and procedures [for system integration and cutover] or the insufficiency of those plans and procedures" which "could result in failure or delays in the merger integration and could adversely impact the combined [FairPoint] company's business, results of operation and financial condition" (Exhibit NECTA/CPVT-MDP-8R at 26).

60. Additional material risk factors associated with the proposed transaction include FairPoint's lack of wholesale experience, the insufficiency of the number of employees that can be hired and retained with "the requisite skills and knowledge to run the combined business," the inability of FairPoint management to manage the integration process effectively or any significant interruption of business activities as a result of the integration process (Exhibit NECTA/CPVT-MDP-8R at 25).

61. FairPoint witnesses have acknowledged risks associated with cutover (Exhibit NECTA/CPVT-MDP-11R; Tr. 9/19/07 at 13:1-14).

### 3. Lack of Wholesale Experience/Resources

62. FairPoint operates small rural telephone companies in 18 states and serves about 300,000 access line equivalents (Nixon Direct at 5:5-7; Pelcovits Direct at 7:14-16).

63. FairPoint has admitted to having no experience as a wholesale service provider (Exhibit NECTA/CPVT-MDP-8R at 25; Pelcovits Direct at 7, 8).

64. Prior to entering into this transaction, FairPoint had no wholesale services organization and virtually no experience in providing wholesale services, having a total of 12 interconnection agreements across 18 states and 30 rural telephone systems (Exhibits NECTA/CPVT-MDP-8R, NECTA/CPVT-MDP-2, NECTA/CPVT Cross-52).

65. FairPoint is developing a wholesale services operation that is not fully staffed or trained and has not demonstrated its readiness to carry out its wholesale service obligations at a level of service at least equal to or better than Verizon's existing wholesale operations (Tr. 9/17/07 at 21:1-25, 22:1-13).

66. FairPoint has not developed training plans for its planned wholesale services organization (Pelcovits Rebuttal at 18:14-15).

67. FairPoint has not yet developed or provided contingency plans related to its cutover (Exhibit NECTA/CPVT-MDP-18R; Haga/Kurtze Rebuttal at 31, 32).

68. The technical ability of FairPoint to serve wholesale mass markets is unproven and the newly created systems that it will use to serve both retail and wholesale markets, is untested (Pelcovits Direct at 8:10-12).

69. The replacement of existing Operational Support Systems ("OSS") provided by an experienced service wholesale provider, with newly created and untested systems to be operated by an entity with virtually no wholesale experience, represents a serious threat to obstruct and impair existing and expected competition in Vermont (Pelcovits Direct at 18, 19).

70. Following its entry into Vermont in August 2006, by virtue of its acquisition of properties formerly operated by Adelphia Communications Corporation, Comcast introduced

Comcast Digital Voice service within its acquired footprint commencing in 2007 (Pelcovits Direct at 10:6-16).

### 4. Hawaiian Telecom Experience

71. The material risks identified by FairPoint are very real as evidenced by a recent Verizon asset transfer in Hawaii to a smaller and less experienced entity, the Carlyle Group. Similar to the instant transaction, the Carlyle Group (a/k/a Hawaiian Telecom) entered into a TSA with Verizon, retained a nationally recognized consultant (Bearing Point) to develop and integrate new systems to replace existing Verizon systems, operated under the TSA for a period of 11 months and still experienced a disastrous cutover (Pelcovits Direct at 19-21).

72. Numerous parallels exist between the current FairPoint transaction and the Hawaiian Telecom transaction and underscore the material risks associated with FairPoint's proposed 3 state flash cutover (Pelcovits Direct at 22-23; Pelcovits Rebuttal at 19).

73. A flash cutover of the magnitude of the FairPoint transaction has not been performed in the United States to date (Tr. 9/19/07 at 101-12).

### 5. Cutover Risks

74. Verizon's existing systems are not available as a backstop in the event that FairPoint's new systems experience large-scale problems at cutover (Haga/Kurtze Rebuttal at 29; Smith Rebuttal at 14, 15; Tr. 9/7/07 at 14, 15).

75. The unavailability of Verizon's existing systems as a backstop in the event of failures in FairPoint's new systems places even greater importance on a comprehensive testing program (Tr. 919/07 at 104:11-25, 105:1-25, 106:1-5).

76. FairPoint has not yet developed any contingency plans to deal with the 30 day period of time that precedes cutover, the transition period during which Verizon's electronic systems will be shut down and orders, if any, will need to be handled manually, and the post cutover period during which FairPoint expects that some service-affecting problems will occur. During the pre-cutover and transition periods, FairPoint wants wholesale customers to reduce the number of orders that they submit (Exhibit NECTA/CPVT-MDP-18R).

77. Wholesale customers will experience service disruptions and impairments, at minimum, when FairPoint will shut down its automated order entry and provisioning systems during the currently estimated five-day transition period prior to cutover. During that time, competitive providers will be unable to process orders or install new customers (Tr. 9/19/07 at 137:1-16).

78. FairPoint has stated that most, but not all of its own training will take place within five months of closing (Tr. 9/19/07 at 224:2-10), meaning that not all training of FairPoint's own employees will have been completed when FairPoint intends to give Verizon the irrevocable Notice of Readiness for Cutover between February 28, 2008 and March 31, 2008.

79. FairPoint has not developed Key Performance Indices for wholesale performance (Nixon Rebuttal at 202-22; Tr. 9/19/07 at 221-222) and would not agree to an independent third party having any input into the development of such KPIs (Tr. 9/19/07 at 222:19-22).

80. Verizon and FairPoint currently estimate a 5-day transition period for the extraction of data from Verizon's systems and the loading of data into FairPoint's new systems (Tr. 9/7/07 at 16:11-22); however, this transition period could last longer (Exhibit NECTA/CPVT-MDP-24R).

81. FairPoint admits to material risks that its cutover planning and cutover readiness may not occur as planned and that it will experience significant service affecting post cutover problems (Exhibit NECTA/CPVT-MDP-8R).

82. Customization and training are required in order to enable competitors to interface with web-based as well as EDI interfaces (Tr. 9/19/07 at 107-109).

83. FairPoint has taken the position that it alone will decide when it is ready for cutover (Pelcovits Rebuttal at 18:8-11).

84. It is FairPoint alone, led by its President, Mr. Nixon, that will determine when FairPoint is ready to give Verizon the irrevocable "Notice of Readiness for Cutover" (Tr. 9/19/07 at 218:4-16). Neither Verizon nor Capgemini would be able to stop the cutover process once said Notice is given.

85. Readiness for cutover involves considerable judgments, including the willingness of FairPoint to proceed with cutover in face of known service affecting issues that it would need to resolve after cutover (Tr. 9/19/07 at 183-185, 190-192).

86. FairPoint has not completed and no party or Board has reviewed or accepted a number of critical FairPoint plans ands actions necessary to ensure adequate system testing criteria, adequate testing processes, system acceptance testing criteria, training and readiness to operate new systems upon cutover (Pelcovits Rebuttal at 18, 19).

87. The foreseeable harms to competitors arising out of FairPoint's flash cutover to new systems include impairment and obstruction in obtaining new customers, where orders by new or existing customers "fall out" and are not processed in a timely manner as expected. System failures relating to order provisioning, number porting, and updating of directory assistance, as well as other service-affecting problems caused by system failures, damage the

business reputation of a competitor, place more demands upon its customer service operations and increase the costs and efforts needed by a competitor associated with taking orders and not being able to fulfill them. (Tr. 9/19/07 at 101:19-25, 102: 1-25, 103: 1-2, 136:6-25).

88. Failures by FairPoint to process trunking orders needed for a competitor to achieve a desired level of service for existing customers would adversely affect existing customers of the competitor. (Tr. 9/19/07 at 103: 3-19).

89. FairPoint expects data entry errors at and after cutover that may take three months to resolve (Tr. 9/19/07 at 33).

90. FairPoint has taken the position that the best course of action is to rigorously test and exercise its new systems and then cutover when fully ready (Haga/Kurtze Rebuttal at 31:14-19).

### 6. Third Party Consultant

91. Prior to hearings, FairPoint had not explained how three state commissions would handle the enormous burden of coordinating and overseeing a three-sate cutover planning and implementation process. No uniform process for the establishment of cutover readiness criteria or review of test results has been provided or explained (Pelcovits Rebuttal at 23:10-14).

92. Dr. Pelcovits recommended that, under these circumstances, an independent third party consultant conduct the certification of readiness of FairPoint's new systems for cutover (Pelcovits Rebuttal at 23).

93. Of critical importance to the testing process of new systems is whether the new systems will work, who decides whether they will work, how they decide and what information

they have available to decide whether the new systems work and cutover can occur (Tr. 9/19/07 at 112:1-16).

94. In Hawaii, no independent third party consultant was used to test or verify the readiness of the new company's systems for cutover (Pelcovits Rebuttal at 24).

95. Reliance upon independent third party testing of OSS systems was used by the Board as part of Verizon's Section 271 process, involving systems used to handle wholesale only transactions (Pelcovits Rebuttal at 27).

96. Third party testing of systems as to their readiness has been common in the telecommunications industry (Pelcovits Rebuttal at 26, 27).

97. A neutral third party role regarding the determination of FairPoint's readiness for cutover is critical for the proposed transaction and affords many benefits to all stakeholders (Pelcovits Rebuttal at 28:2-15).

98. Dr. Pelcovits recommended as a merger condition the requirement that an independent third party be retained at FairPoint's expense to test and audit the readiness of FairPoint's systems for cutover. He further recommended that the Board retain oversight of the testing process and, with input from the independent third party, approve whether FairPoint's systems are ready for cutover (Pelcovits Rebuttal at 28:16-21).

99. Dr. Pelcovits further recommended that the cutover readiness of FairPoint involve input from competitors, Verizon, the third party and public staff. He testified that the OSS systems must be able to demonstrate the ability to operate at adequate flow levels and handle the typical range of problems encountered in a commercial setting (Pelcovits Rebuttal at 28, 29).

100. A failure of the cutover process would be disastrous to competitors of FairPoint, including CPVT (Pelcovits Rebuttal at 32:5-20, 33-34).

101. FairPoint has incentives to rush the cutover date in order to avoid TSA payments amounting to $14.2 million per month for Schedule A Services only during the first eight months after the merger closing, in addition to other amounts payable to Verizon under the TSA (Pelcovits Rebuttal at 30-32; Verizon Exhibit 4, TSA; Tr. 9/19/07 at 177:9-16).

102. An experienced third party consultant would add value and not bog down or interfere with FairPoint's cutover readiness process, according to DPS witness Mills (Tr. 9/19/07 at 167, 168).

103. The Board must balance factors of cost and delay associated with cutover planning and cutover versus the quality of service and cost impacts on the State if the cutover process fails, as it did in Hawaii (Pelcovits Rebuttal at 30:8-10).

104. The Board's obligations to the public involve a different balancing of factors than FairPoint's obligations to shareholders (Pelcovits Rebuttal at 30:13-14).

### 7. "New Hampshire Proposal"

105. On September 10, 2007, FairPoint witness Haga and Kurtze filed rebuttal testimony in New Hampshire Public Utilities Commission Docket No. DT07-011, in which they proposed that the public staffs in the three states retain one of the current consulting firms involved in the pending merger proceedings as a single expert to review the FairPoint Test Strategy document. Such documentation includes: test strategy definitions and objectives; test defect classifications and guidelines; system test entry and exit criteria; testing metrics; and notice of readiness (cutover) criteria. These and other aspects of this proposal are set forth in an excerpt from this New Hampshire rebuttal testimony (Exhibit NECTA/CPVT Cross-53).

106. Dr. Pelcovits explained to the Board why he was not satisfied with this so-called "New Hampshire Proposal" which FairPoint itself had not sponsored in any testimony offered in this proceeding (Tr. 9/19/07 at 120:20-25, 121:1-25, 122:1-25, 123:1-25, 124:1-25, 125:1-9).

107. Dr. Pelcovits testified that a third party under the "New Hampshire Proposal" would need to be involved while the testing strategy is developed and finalized. Only then would the third party be in a position to say whether the strategy was deficient in some area. The third party could then assure that steps were taken by FairPoint to properly design its tests (Tr. 9/19/07 at 138:12-25, 139:1-4).

108. Dr. Pelcovits further recommended that the independent third party under the "New Hampshire Proposal" should be in a position to confirm and observe the results of testing and determine if the systems pass testing criteria. Such a process would assure that a third party that does not have FairPoint's financial interests at stake to say that there is a greater risk to the public than is acceptable for the cutover to take place at a particularly early point in time (Tr. 9/19/07 at 139:5-23).

109. Use of a third party to assess FairPoint's readiness for cutover would avoid delays that might be caused by disagreements between FairPoint and other stakeholders, such as competitors, that might occur if no third party were involved to make an independent assessment of FairPoint's readiness for cutover (Tr. 9/19/07 at 132-134).

110. Cutover failures may have long–term impacts, not merely short-term inconveniences, as experience with Hawaiian Telcom's cutover from Verizon systems illustrates, and would damage the ability of CPVT to market and turn up new customers in Vermont and be very costly (Tr. 9/19/07 at 125:10-25, 126:1-16).

111. DPS witness Mills also explained why he was not satisfied with the "New Hampshire Proposal" and offered suggestions that he regarded as important (Tr. 9/19/07 at 183:15-25, 184:1-25. 185:1-24).

112. Mr. Mills stressed the need for inclusion in the cutover readiness process of components that FairPoint has not included: business simulation and conversion testing (Tr. 9/19/07 at 200-204).

113. Mr. Mills suggested that an independent third party would not exercise veto power over a cutover by FairPoint. Rather, he recommended that the independent third party report to the Board and that the Board would be empowered to tell FairPoint that FairPoint was not ready to give Verizon the irrevocable Notice of Readiness for Cutover (Tr. 9/19/07 at 189-191).

## B. DISCUSSION

### 1. Independent Third Party Testing Similar to the Section 271 Process Should be Required in Order to Avoid Obstruction and Impairment of Competition and to Promote the Public Good

The Board should condition any merger approval upon the selection and use of an independent third party consultant to conduct testing, at FairPoint's expense, of FairPoint's proposed new suite of back office systems based on objective acceptance criteria, and otherwise determine FairPoint's readiness for cutover based upon, but not limited to, a number of other operational cutover readiness criteria urgently needed in light of the unique circumstances presented.

Third party testing has been used extensively in the telecommunications industry and relied upon by the Board in the context of Section 271 proceedings for the testing of Verizon wholesale systems. It would afford critical protections for wholesale and retail customers alike as well as the State of Vermont where, as here, the cutover by FairPoint impacts customers such as hospitals, police, fire, emergency services, and schools, as well as businesses and residents. Independent third party testing would create a safeguard that did not exist in Hawaii and would maximize the prospects that the proposed transaction would occur without material customer affecting disruptions (both wholesale and retail), would promote the public good, and would not obstruct or impair competition.

The tradeoff for true third party testing - some potential delay and additional TSA payments - is well worth the additional protections afforded to the public and to competing service providers.

**a. The significant risks associated with a flash cutover of new back office systems warrant true third party testing to safeguard against obstruction and impairment of competition arising out of the proposed cutover**

The FairPoint cutover process poses substantial risks of obstruction and impairment of competition that warrant merger conditions to mitigate against these risks.

Of grave concern is FairPoint's planned three-state flash cutover. The material risks associated with this plan have been acknowledged by FairPoint in its SEC S-4 filing:

> FairPoint may be unable to integrate the Spinco business into its operations in an efficient, timely and effective manner. FairPoint's inability to complete this integration successfully could have a material adverse effect on the combined company's business, financial condition and results of operations.
>
> All of the risks associated with the integration process could be exacerbated by the fact that FairPoint may not have a sufficient number of employees to integrate FairPoint's and Spinco's businesses or to operate the combined company's businesses.

> In addition, if the combined company continues to require services from Verizon under the transition services agreement after the one year anniversary of the closing of the merger, the fees payable by the combined company to Verizon will increase significantly...The aggregate fees expected to be payable by the combined company under the transition services agreement for the six-month period following the merger will be approximately $132.9 million.[14] However, if the combined company requires twelve months of transition services following the merger, the aggregate fees expected to be payable will be approximately $226.9 million.

The creation of a suite of totally new systems to provide telephone services to retail and wholesale customers in Vermont, as FairPoint has proposed, is a daunting task that poses many risks for consumers and the State as a whole. (Pelcovits Direct at 18, 19).

These risks are concrete and serious. The only recently attempted flash cutover even close to the magnitude and nature contemplated by FairPoint in New England is the disastrous flash cutover from Verizon systems in Hawaii. As discussed above, the Hawaiian Telecom cutover was completed with the assistance of Bearing Point, an international consulting firm – like Capgemini, and a buyer that also had no wholesale experience. Additionally, Hawaiian Telecom, like FairPoint, hired experienced employees from the telecommunications industry at the same time it was seeking regulatory approvals for its proposed transaction. The buyer's leadership team included a former FCC Chairman and a number of individuals with telecommunications industry operating experience. Just as FairPoint has done, the buyer in

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14 Note that FairPoint's planned cutover date of May 31, 2008, assumes only four months of TSA payments, which would require FairPoint to provide Verizon with the irrevocable Notice of Readiness to Cutover under the TSA between February 28, 2008-March 31, 2008, or 1-2 months after the expected merger closing date. This rushed schedule leaves no room for an independent third party consultant to provide the safeguards against a premature cutover that are desperately needed here, given the disastrous experience that occurred in Hawaii (Pelcovits Direct at 19-24; Pelcovits Rebuttal at 19). It is critical for the public good and for avoidance of obstruction and impairment of competition that any independent third party consultant be afforded adequate time to assure that in its best judgment, FairPoint is ready to give Verizon the irrevocable Notice of Readiness to Cutover and that the Board and Commissions responsible to the public have received adequate assurances and evidence of such readiness. This public protection role is critical where FairPoint has admitted that the decision to go forward with cutover rests with Mr. Nixon, not with the technical staff like Mr. Haga or FairPoint consultant Capgemini . Mr. Nixon could readily accept a tradeoff that saves months of TSA payments in exchange for a degraded post cutover period during which FairPoint would fix both known and unknown problems.

Hawaii arranged for as Transition Services Agreement to cover the period of operations between merger closing and the flash cutover to the buyer's new back office systems (Pelcovits Direct at 22, 23). As in the case of Hawaii, Verizon is under *no contractual obligation* to ensure that the new systems of its successor will function properly (Exhibit NECTA/CPVT Cross-5).

As acknowledged by FairPoint, in Hawaii a detailed cutover plan was put in place, with testing protocols to ensure that the new systems would perform properly to serve both retail and wholesale customers. Conditions were imposed to ensure that the risks of system changes would be minimized. The Hawaii PUC approved Verizon's asset sale to the Carlyle Group in Docket No. 04-0140 on March 16, 2005, and the cutover to new systems occurred on April 1, 2006. Multiple problems became apparent immediately. Hawaiian Telcom (the buyer) reported that on the cutover date:

> "…critical systems related to back-office functions, such as customer care, order management, billing, supply chain, and other systems interfacing with our financial systems, lacked significant functionality. This led to deficiencies in billings and collections, revenue assurance, and order entry flow-through."[15]

Problems were reported continuing in 2006, with significant incremental expenses being incurred and continuing deficiencies in many areas. As Hawaiian Telcom further reported:

> "The lack of full system functionality following the Transition Period substantially impacted both customer satisfaction…and collection efforts in 2006….We continue to work to improve our system functionality."[16]

Hawaiian Telcom identified several risks associated with this undertaking, among which were the company's limited experience operating as a stand-alone provider of

[15] Exhibit NECTA/CPVT-MDP-10 (Hawaiian Telcom Communications Inc. Form 10-K [2006] at 18)
[16] Exhibit NECTA/CPVT-MDP-11 (Id., at 19)

telecommunications services, the significant capital expenditures and transition expenses incurred in the process of the takeover, and the potential unavailability of funds if revolving credit loan conditions were not met. In particular, Hawaiian Telcom noted:

> "Our lack of critical back-office systems and IT infrastructure has negatively impacted our ability to operate as a standalone provider of telecommunications services, which has had an adverse effect on our business and results of operations."[17]

Recognizing the tasks still in front of it, Hawaiian Telecom stated that "there is no assurance ... when we will achieve fulfill functionality."[18]

The parallels between the Hawaiian Telcom debacle and the present case are startling. As in the Hawaiian Telecom example, Verizon has entered into a transition services agreement with a less-experienced, much smaller entity and that entity (here, FairPoint) has stated its intention to develop new systems to replace Verizon's existing systems.

Also as in Hawaii, FairPoint has relied upon a service agreement with an outside consulting firm to develop these new systems. At this stage, the newly created systems have not been fully integrated or comprehensively tested. FairPoint has not yet fully staffed its operations to replace Verizon. It has not developed or provided detailed training plans. It has not developed the contingency plans for dealing with service affecting problems that emerge after cutover, or material failures during the cutover process. It has not developed training plans for interconnecting carriers that will depend upon the functionality and interoperability of its yet to be assembled and never before integrated systems (Pelcovits Rebuttal at 18, 19). FairPoint has no pre-existing wholesale experience ( Exhibit NECTA/CPVT-MDP-8R).

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[17] Id.
[18] Exhibit NECTA/CPVT-MDP-12 (Id., at 25)

Wholesale customers require a level of protection against the risks associated with the replacement of existing Verizon systems with new, untested systems to be put in place by FairPoint. FairPoint's lack of wholesale experience and the uncertainties regarding adequacy of its wholesale staffing size and qualifications to take the place of Verizon exacerbate the risks that face wholesale customers of Verizon and the resulting harms identified by Dr. Pelcovits.

As the Hawaii experience indicates, a failed cutover could take years to fix. The ability of FairPoint to meet its multiple commitments to the Board and various stakeholders would vanish if it encountered large scale problems affecting simultaneously three different states. No contingency plans for dealing with the material and admitted risk have been provided by FairPoint. Nor have documented escalation procedures been created to deal with any material breakdowns during or after transition. Safeguards such as a third party independent testing must be put in place to avoid these risks, as well as to review the adequacy of such plans and processes.

### b. The "transition period" obstructs and impairs competition

Further, FairPoint has failed to adequately acknowledge the harm that this transaction will impose upon competitors as a result of the so-called "transition period" during which competitors have been told that they must cease the placement of orders electronically as well as reduce the number of orders that they can submit. This transition period has been estimated to last five days, although FairPoint admits that it will not really know the length of the transition period until after it has conducted a second Verizon data extract and has a better appreciation for the amount of time required to transfer accurately and completely Verizon data into the new systems that FairPoint has yet to build and integrate (Exhibit NECTA/CPVT-Cross- 40). A longer "transition period" would further degrade the level of service that wholesale customers receive today and would continue to receive in the absence of this "transition period."

The transition period is especially harmful to mass market service providers that require prompt placement of orders from consumers that are willing to switch service providers. Transition period delays and other service–affecting problems could result in lost business, which has a disproportionate negative impact on competitors than upon the ILEC. Dr. Pelcovits explained how the business reputation of a competitor to the ILEC can be irreparably harmed by delays in disruptions in the provisioning of services as might be expected during the "transition period" and in the event of a failed cutover (Tr. 9/19/07 at 126:9-16). No system or assurance is in place to determine the extent to which competitor orders will be blocked or slowed as FairPoint gears up for cutover. Nor is there any system or assurance in place to achieve parity with FairPoint treatment of retail customers during this period. The extra costs incurred by competitors during this transition period also are not being assumed by FairPoint. For these reasons, third party involvement is critical.

**2. In the alternative, if the Board Permits FairPoint to Conduct its Own System Testing, the Board Should Require as a Merger Condition the Appointment of an Independent Third Party Consultant, Satisfactory to the Board and at FairPoint's Sole Expense, to Verify the Readiness of FairPoint's Systems for Cutover, Based Upon Adequate System Acceptance Criteria, and Verify the Readiness of FairPoint for Cutover, Based Upon at Least the Cutover Readiness Criteria Set Forth Herein, all Subject to the Board's Ability to Defer a Notice of Readiness to Cutover Until it is Satisfied as to FairPoint's Readiness**

In the alternative, if the Board does not require an independent third party tester, it should direct as a merger condition that an independent third party consultant be retained, at FairPoint's sole expense, to: (1) verify the readiness of FairPoint's system for cutover, based upon input to and review of adequate system acceptance criteria; (2) verify the readiness of FairPoint for cutover in other critical respects; (3) report its findings to the Board; and leave it to the Board to determine FairPoint's readiness to give Verizon the irrevocable Notice of Readiness for Cutover.

NECTA and CPVT agree with DPS witness Mills that the Board must retain the ability and authority to determine whether FairPoint is not ready for cutover. We also concur with Mr. Mills that cutover readiness includes both objective and subjective criteria.

### 3. The Board should require FairPoint to meet other operational criteria as condition of cutover.

In addition to the third-party involvement in system testing discussed above, The Board should require FairPoint to meet a number of other very critical operational cutover readiness criteria, many of which FairPoint has acknowledged during hearings as important. These acknowledged operational cutover readiness criteria include: (a) training of wholesale customers; (b) provision of job aids and reference materials to wholesale customers; (c) preparation of escalation plans for day-to-day operations as well as for the cutover process; (d) training of FairPoint's retail and wholesale staffs; (e) provision of reasonable time for wholesale customers to modify their software and equipment in order to be interoperable with FairPoint's new systems; (f) provision of reasonable time for wholesale customers to conduct internal training; (g) provision of reasonable time for wholesale customers to test the ability of their systems to interoperate with FairPoint's new systems; (h) development of plans to address wholesale customer data losses occurring during the cutover, including contingency plans and escalation procedures; (i) establishment of as pole and conduit license services administration group (Tr. 9/18/07 at 147-152). The operational readiness of FairPoint to step into the shoes of Verizon is critical to the Board's findings on whether the proposed transaction will obstruct or impair competition and promote the public good (Tr. 9/19/07 at 200-204).

Because of FairPoint's lack of wholesale experience, the risks associated with cutover and the impacts of a failed cutover on retail and wholesale customers, the Board must be especially vigilant in placing conditions on any merger approval to mitigate the risks that FairPoint will not be equipped to take over Verizon's wholesale operations and that the proposed transaction would result in the impairment and obstruction of competition. It bears repeating:

> Spinco offers services that FairPoint has no experience in providing, the most significant of which are competitive local exchange carrier wholesale services. FairPoint's failure or inability to hire or retain employees with the requisite skills and knowledge to run the combined business may have a material adverse effect on FairPoint's business (Exhibit NECTA/CPVT-MDP-8R. See, also, Exhibit NECTA/CPVT-MDP-9R.)

It would be patently unreasonable for the Board to require wholesale customers to simply trust that FairPoint will be capable of starting from scratch and building a wholesale operation equal to that provided by Verizon today, after 11 years of experience under the Telecommunications Act of 1996. Accordingly, the Board should condition approval of the merger transaction on FairPoint proving to the satisfaction of an independent third party consultant that it has an adequately staffed and trained wholesale services organization prior to cutover, as well created adequate contingency plans and escalation procedures. The approach of "trust-but-verify" is a reasonable approach for the Board to take in dealing with the adoption of merger conditions relating to the transition period and cutover.

Moreover, given that FairPoint plans to build an ILEC operation from the ground up and the preliminary nature of its efforts to date, the Board needs to require a demonstration, subject to independent third party participation and review, as to FairPoint's readiness to give Verizon the irrevocable Notice of Readiness for Cutover:

> At this late stage in this proceeding, FairPoint has not completed a number of critical actions: (1) completed selection of all new systems and provided system specifications; (2) developed testing plans for review; (3) established system testing criteria for review; (4) established internal training plans for review; (5) developed a detailed checklist and timeline covering necessary interactions with interconnecting parties, including the provision and exchange of information, training, testing of compatibility of systems (not just the use of the WISOR gateway, but the actual flow through of ordering and provisioning requests, billing and other back office functions); (6) established cutover acceptance criteria for review; (7) determined the actual length of the so-called dark period or transition period when Verizon ceases taking orders, data is transferred from Verizon to FairPoint and FairPoint systems are ready to operate; (8) developed escalation plans to address dark period and cutover problems; (9) developed contingency plans for review; (10) disclosed in full detail the "final release" activities of Capgemini that are not due to occur until after the flash cutover and the effects of performing these activities after the flash cutover; and (12) agreed to provide remedies to competitors if the cutover process experiences significant problems (Pelcovits Rebuttal at 18, 19).

Accordingly, NECTA and CPVT recommend that the Board require, as a merger conditions and as part of the FairPoint's cutover readiness criteria, the following, subject to review by an independent third party consultant and with an opportunity for stakeholder input prior to such third party consultant's determination of the adequacy and satisfaction of these operational cutover readiness criteria:

1) adequate number of trained and experienced staff to conduct wholesale operations

2) adequate number of trained and experienced staff to conduct pole attachment license services administration group functions

3) adequate number of trained and experienced staff to perform make ready survey and make ready work in accordance with Board rules

4) confirmation of receipt of pole attachment records from Verizon and identification of the records received

5) development and conduct of adequate training programs for wholesale customers, including training content, number of individuals to be trained, amount of training and use of qualified trainers

6) development of contingency plans for use before, during and after the cutover date, subject to review and approval of an independent third party consultant

7) development of escalation plans to address service affecting problems in a timely manner

8) proof of ability to provide number porting in the same manner and upon the same intervals as Verizon (Exhibit NECTA/CPVT-MDP-1R)

9) proof of ability to meet trunk orders within the same intervals as Verizon (Exhibit NECTA/CPVT-MDP-1R)

10) establishment of a wholesale customer website equivalent in functionality and utility as that operated by Verizon (Exhibit NECTA/CPVT-MDP-1R)

11) assignment of dedicated account managers and account teams prior to closing for wholesale customers that have such arrangements with Verizon today

12) completion of all e-bonding work needed to enable the same level of service provided by Verizon today for wholesale customers than use e-bonding

13) satisfactory work regarding the employment of new point codes required by wholesale customers and FRP as a result of this transaction

14) provision of information in advance regarding any change in the length of the 5 day "transition period" that precedes the cutover date and supplementation of workforce needed to handle orders manually during an extended "transition period"

15) provision to wholesale customers of test results and any information provided to the third party consultant regarding any claim of readiness for cutover, including any information regarding known service affecting or other system problems that FRP expects to address after cutover, the seriousness of such problems, the length of time expected to cure such problems and the rationale for cutover in advance of curing such problems

16) complete description of all work to be performed during the 6 month period between the cutover date and final release.[19]

17) development of all business rules, codes of conduct

18) development of all conduit license forms and procedures

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[19] Any third party consultant should be retained to cover the period after the cutover date and through the date of final release. If service affecting problems are continuing at the time of final release, the third party consultant should remain in place until these service affecting problems have been cured.

## VI. AS A CONDITION FOR APPROVAL OF THE PROPOSED MERGER TRANSACTION, FAIRPOINT SHOULD BE REQUIRED TO PROVIDE INTERCONNECTING CARRIERS WITH AT LEAST THE SAME LEVELS OF SERVICE NOW PROVIDED BY VERIZON

### A. FINDINGS OF FACT

114. FairPoint has agreed to assume the Performance Assurance Plan ("PAP") now applicable to Verizon (Exhibit Board-2).

115. FairPoint has testified that it will provide wholesale customers with services as good or better than they receive from Verizon today and that the proposed transaction will be "essentially seamless" for wholesale customers (Lippold Rebuttal at 15:5-11, 20:13-14, 33:8-9).

116. Competition would be impaired or obstructed as a result of this transaction if FairPoint did not provide wholesale customers with services as good or better than they receive from Verizon today. (Pelcovits Direct at 16:16-20, 17:1-5, 24-59; Pelcovits Rebuttal at 3-12).

### B. DISCUSSION

#### 1. FairPoint Should be Required Through Merger Conditions to Provide Critical Interconnection Services Provided by Verizon Today, Including but Not Limited to Number Porting, Trunk Ordering and Tandem Transit Services

As Dr. Pelcovits has testified, it is critical that FairPoint be required to provide wholesale customers with levels of service equal to or better than the levels of service provided by Verizon today. FairPoint has no existing wholesale experience according to its own disclosures. The limited interaction between Comcast and FairPoint in Washington State does not breed confidence. While Mr. Lippold's faith in his new wholesale organization is understandable, he is just starting to hire new staff and the number and composition of staff that he will inherit from

Verizon is unknown. The entire group will need to be trained on new systems that have not been previously integrated. There is a substantial risk of obstruction or impairment of competition unless the Board makes it very clear, through some baseline conditions, that FairPoint must be positioned and capable of delivering at least the following services.

### a. Number Porting

NECTA and CPVT recommend that the Board impose a merger condition that FairPoint adhere to specific number porting policies that Verizon follows today. These policies include: Firm Order Commitment (FOC) within 24 hours, 3 business day interval for simple ports, which include ports where the subscriber is canceling FairPoint DSL service and weekend porting (NECTA/CPVT Exhibit MDP-1R at 2; Pelcovits Direct at 53; Tr. 9/19/07 at 131:21-25, 132:1-20).

Dr. Pelcovits has explained the critical importance of number porting to Verizon's competitors and to future competitors of FairPoint if the proposed merger transaction is approved by the Board:

> Number porting is at the very core of competition. Failure to seamlessly port a telephone number reflects poorly on the competitor, regardless of whether the breakdown is due to the ILEC or the competitive provider. Porting requires a well-functioning interaction between FairPoint and competitors.

(Pelcovits Direct at 53:3-18, also setting forth the specific number porting practices with which FairPoint must be required to comply).

FairPoint has made several commitments regarding compliance with industry number porting intervals, but not in each case with the specificity requested by NECTA and CPVT to assure at least parity with what Verizon does today (e.g., Exhibit NECTA/CPVT Cross-23, dealing with 4 day interval for simple ports; Exhibit NECTA/CPVT Cross-24, committing to

Verizon porting policy, but failing to respond to specific question as to Verizon's "Due Date + 1" number porting policy; Exhibit NECTA/CPVT Cross-25, stating that FairPoint planning is not sufficiently advanced to enable it to commit to a FCC requirement regarding the porting of a DSL customer's phone service to competing facilities-based providers).

Given these circumstances, and in order to avoid any obstruction or impairment of competition as a result of the proposed transaction, the Board should adopt the merger condition recommended by NECTA and CPVT.

### b. Trunk Ordering Intervals

NECTA and CPVT have recommended that the Board condition any approval of this transaction upon FairPoint's adoption, at a minimum, of Verizon's standard business rules and intervals on trunk ordering (Exhibits NECTA/CPVT-MDP-1 at 1, NECTA/CPVT-MDP-1R at 1; Pelcovits Direct at 41, 42).[20]

### c. Dedicated Account Manager and Account Team

NECTA and CPVT have recommended that as a merger condition FairPoint be required to provide a dedicated account service manager and a dedicated account team for interconnecting carriers, as Verizon does today (Pelcovits Direct at 59:1-12; Exhibit NECTA/CPVT-MDP-1 at 3).

This recommendation does not mean that such an account manager and account team would perform services for a single interconnecting carrier. Rather, it means that an interconnecting carrier would have a "go to" service manager handling its account as well as a

[20] NECTA/CPVT has advocated for a change to the threshold of trunk orders deemed to trigger a "project" and thus, non-standard trunking intervals. NECTA/CPTV agrees that this item can be reserved for future discussion with FairPoint if the proposed merger transaction is approved. Accordingly, they do not seek a merger approval condition requiring the expansion of the number of DS1s in a standard trunk order from 9 to 28, as previously requested.

"go to" account team to handle its service issues. Such arrangements would provide continuity of service, consistent with Verizon's current practices and assure that there will be no impairment in competition as the result of degrading the level of interaction between the ILEC and interconnecting carriers following this transaction (Pelcovits Direct at 59: 1-12; Exhibit NECTA/CPVT-MDP-1 at 3).

#### d. Tandem Transit Services

Transit or tandem transit services are provided by Verizon to interconnecting parties to enable their interconnection to other service providers, including smaller ILECs, wireless carriers and other competitors. Transit service enables a competitor to offer universal connectivity to its own customers, which means that its customers can make and receive local calls from any other telephone subscriber.

Competitors are dependent upon Verizon today because it is the only entity that is able to provide transmit service capable of enabling indirect connection and universal connectivity between and among all carriers in the State of Vermont. There are no competitive transit service providers that can provide this service ubiquitously. Competitive service providers are unable to compel other service providers to connect directly with them. Further, the large scale and scope economies that characterize telecommunications networks make direct connections between carriers uneconomic and inefficient. Due to its historic monopoly position, Verizon is the only provider that can efficiently connect all the local providers in Vermont (Pelcovits Direct at 37, 38; Pelcovits Rebuttal at 8; Tr. 9/19/07 at 100:17-25, 101:1-12).

As a successor to Verizon, FairPoint must be required to provide transit service as an interconnection agreement service in the same manner as Verizon does today. FairPoint refused to commit to assuming Verizon's existing practices when asked to do so during discovery

(Pelcovits Direct at 39; Exhibit NECTA/CPVT-MDP-18). In rebuttal testimony, FairPoint misleadingly implied that it has no bottleneck control over transit and that direct connections could readily supplant transit service. It claimed no need for a merger condition (Pelcovits Rebuttal at 7, referring to Lippold Rebuttal at 29-30).

Dr. Pelcovits explained why FairPoint's refusal to commit to the continued availability of transit service would impair and obstruct competition in Vermont. Simply put, there is no evidence of any viable alternatives to transit service in Vermont. Mr. Lippold failed to offer any specific evidence of an alternative ubiquitous transit service provider. Nor did he refute the fact that direct connections between competing carriers cannot be compelled and remains economically impracticable given the small amount of traffic exchanged between individual service providers (Pelcovits Rebuttal at 8:2-19).

For these reasons, the Board must impose a merger condition requiring that FairPoint offer tandem transit services pursuant to interconnection agreements based on the same terms and conditions as Verizon for at least a three year period following the merger closing date.

#### e. Information on Trunking Utilization and Timely Augments

FairPoint must be required to honor the terms of existing interconnection agreements regarding the provision of information to interconnecting parties on trunking utilization and augments (Pelcovits Direct at 41; Pelcovits Rebuttal at 10-11). FairPoint has opposed acceptance of this obligation (Harrington Rebuttal at 10) (Exhibit NECTA/CPVT Cross-54 at page 57). Existing interconnection agreements require the provision of interconnecting carrier forecasts that Mr. Harrington considers essential (Exhibit NECTA/CPVT Cross-54).

### f. Mid Span Meets

Dr. Pelcovits has recommended that FairPoint be required to make available in Vermont mid-span meet arrangements comparable to what Verizon has made available in New Hampshire. Mid-span meet architecture is an acceptable form of interconnection pursuant to Section 251. FairPoint refused to make any such commitment (Pelcovits Direct at 44:9-16; Exhibit NECTA/CPVT-MDP-21). In rebuttal testimony, FairPoint stated that FairPoint would do what Verizon is doing (Pelcovits Rebuttal at 9:1-3, citing Lippold Rebuttal at 31 and Exhibit NECTA/CPVT-MDP-5R).

In New Hampshire, despite mid-span meet requirements expressly provided in the interconnection agreement, Verizon, despite its clear obligation to provide mid-span meet architecture, dragged out the negotiation of an amendment to an interconnection agreement for over 12 months, causing delays in deployments needed by Comcast. CPVT is concerned that FairPoint will employ the same tactics as Verizon to delay unreasonably the provision of mid-span meets. FairPoint's lack of experience in dealing with wholesale service provider requests is an additional concern (Pelcovits Rebuttal at 9-10).

For these reasons, the Board should direct FairPoint to make available in Vermont the same type of mid span meet arrangements that Verizon currently provides in New Hampshire, and must do so without the delay tactics employed by Verizon. The specific mid span meet arrangements in place in New Hampshire were provided by Dr. Pelcovits and the Board should require FairPoint to adopt them, consistent with its generalized commitment to "do what Verizon is doing" (Pelcovits Rebuttal at 10:3-9 and Exhibit NECTA/CPVT-MDP-6R).

### g. Wholesale Website

FairPoint has agreed to offer a wholesale website comparable to what Verizon makes available today. However, a merger condition is required to assure that this commitment remains enforceable and provide a greater degree of certainty for wholesale customers that service levels now provided by Verizon will not be degraded by FairPoint.

### h. CLEC User Forum

FairPoint has agreed that it will conduct CLEC User Forums, as Verizon does today.(Exhibit NECTA/CPVT Cross-19). However, this commitment must be made a merger condition in order to remain enforceable and provide a greater degree of certainty for wholesale customers that service levels provided by Verizon will not be degraded by FairPoint.

### i.. Automated Interfaces

FRP did not commit to maintaining all automated CLEC interfaces and wholesale provisioning and ordering systems as currently provided by Verizon (Exhibit NECTA/CPVT Cross-32).

NECTA and CPVT request that the Board require as one of numerous cutover readiness criteria full disclosure by FairPoint to wholesale customers regarding the interfaces and wholesale provisioning and ordering systems sufficiently in advance to enable wholesale customers to implement software and equipment changes and training of internal staff prior to cutover.

If a third party independent consultant is approved by the Board to help establish cutover readiness criteria and report to the Board regarding FairPoint's readiness to give Verizon the irrevocable Notice of Readiness to Cutover, such consultant should be directed to include, among required cutover readiness criteria, the above recommendation. Since FairPoint has indicated that it intends to share its plans with wholesale customers (Exhibit NECTA/CPVT Cross-32), adoption of this cutover readiness requirement would not unduly burden FairPoint or cause delay.

#### j. Parity with Retail Services

FairPoint must provide wholesale customers with parity in all respects – service, provisioning, order processing, and escalation – in comparison to its retail customers. The provision of parity must be maintained at all times, but it is critical through the Transition Services Agreement stage post closing, during the currently estimated 5 day "transition period" that precedes the Cutover Date and during the post Cutover Date period. Particularly of concern is during the "transition period" where orders must be processed manually, especially if this period of manual intervention continues for an extended period of time, as it did in Hawaii. Wholesale customers must be provided assurances that their businesses will not suffer as a result of this transaction. The risk of an extended period of manual intervention due to failures during cutover underscores the need for comprehensive contingency planning, wholesale escalation, and trouble resolution procedures. Given the potential for service-related problems that may result from the proposed transaction, the Board should reinforce through a merger condition that FairPoint be required to maintain parity between wholesale and retail services, and retain continuing jurisdiction to resolve disputes that arise during this period.

## VII. AS A CONDITION FOR APPROVAL OF THE PROPOSED TRANSACTION, THE BOARD MUST REQUIRE FAIRPOINT TO SEPARATE ITS RETAIL AND WHOLESALE ORGANIZATIONS IN ORDER TO AVOID OBSTRUCTION OR IMPAIRMENT OF COMPETITION

### A. FINDINGS OF FACT

117. FairPoint originally expected to create a separate wholesale organization (Nixon Direct at 14).

118. FairPoint admits that a separate wholesale organization could be created (Tr. 9/19/07 at 217:6-14).

119. In rebuttal testimony, FairPoint proposed for the first time a combined wholesale and mid and large size retail business services organization (Lippold Rebuttal at 1-2).

120. Under FairPoint's proposed organization, the individuals responsible for negotiating interconnection agreements with wholesale customers also would have retail contract negotiation and service functions (Tr. 9/7/07 at 272:19-25, 272:1-3; Pelcovits Rebuttal at 37:18, 38:1-3; Exhibit NECTA/CPVT-MDP-25R).

121. FairPoint has admitted that in any organization where employees have knowledge of potential retail customer losses to a wholesale competitor, an opportunity to act in an anti-competitive manner exists, even if there are business rules or codes of conduct in place to discourage such anti-competitive behavior (Tr. 9/17/07 at 66-68).

122. Verizon does not structure its wholesale operations such that wholesale contacts also engage in retail business of Verizon (Pelcovits Rebuttal at 37:11-18, 38:1-16).

## B. DISCUSSION

NECTA and CPVT strenuously object to FairPoint's proposal to combine its retail and wholesale organizations under the leadership of a single manager. Mr. Lippold testified that his proposed organization would have the very same individuals who handle interconnection agreement negotiations with wholesale customers also involved with retail business customers, including the negotiation of retail contracts (Tr. 9/7/07 at 272:19-25, 273:1-3).

The type of organizational structure proposed by FRP invites anti-competitive abuses despite the adoption of a code of conduct against such abuses (Tr. 9/17/07 at 66-68).[21] Nixon, who originally testified that wholesale and retail organizations were expected to be separate, admitted that these organizations could be kept physically separate (Nixon Direct at 14; Tr. 9/19/07 at 217:6-14).

CPVT and NECTA are seriously concerned that the FairPoint organization serving wholesale customers also would be responsible for developing revenues from medium and large size retail business customers. In fact, it appears the contract management team, which is supposed to negotiate interconnection agreements, will be responsible for both interconnection agreement negotiation and business agreement negotiation.[22] This organizational structure appears to create a conflict of interest that will impact wholesale customers engaged in interconnection negotiations or ordering facilities from FairPoint. While FairPoint states that

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[21] FairPoint's statements are completely inconsistent on this issue. On one hand, Mr. Lippold denies that a combined business structure, with employees handling sensitive wholesale contract negotiations also having retail customer duties, creates potential business conflicts (Tr. 9/7/07 at 273:16-23). On the other hand, he admits to the need for safeguards such as business rules and codes of conduct (Tr. 9/7/07 at 271:1-3) as well as to the fact that codes of conduct do not prevent anti-competitive abuses (Tr. 9/17/07 at 66-68).

[22] Exhibit NECTA/CPVT-MDP-25R

"strict business rules will be developed"[23] regarding the handling of competitive information, this cannot provide the same protection as separate wholesale and retail organizations. The anti-competitive harm that FairPoint's proposed organization would create can be easily avoided or mitigated by separating wholesale management from retail management, as Verizon historically has done. No sound reason exists for the Board to permit the type of organizational structure for wholesale operations proposed by FairPoint (Pelcovits Rebuttal at 37, 38).

## VIII. FAIRPOINT SHOULD BE REQUIRED TO REIMBURSE WHOLESALE CUSTOMERS FOR COSTS THAT THEY INCUR IN CONNECTION WITH SOFTWARE, HARDWARE AND INTERNAL TRAINING REASONABLY REQUIRED IN ORDER TO ENSURE THAT THEIR SYSTEMS WILL BE INTEROPERABLE WITH THE NEW SYSTEMS OF FAIRPOINT AND SHOULD REIMBURSE WHOLESALE CUSTOMERS FOR ANY HARMS ARISING OUT OF THE PROPOSED TRANSACTION.

### A. FINDINGS OF FACT

123. FairPoint has refused to provide remedies to wholesale customers, such as that recommended by Mr. Ball, in the event that wholesale customers are damaged as a result of a flawed cutover (Lippold Rebuttal at 20, 21).

124. FairPoint has refused to compensate wholesale customers for the costs that they will incur and the harms that their businesses will experience as a result of the proposed changeover to the new systems being implemented by FRP, the negative impacts of the "transition period" and any other costs and losses that are experienced as a result of this transaction (Lippold Rebuttal at 19, 20).

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[23] Exhibit NECTA/CPVT-MDP-26R

125. FairPoint witness Lippold testified that wholesale customers already have existing remedies against the incurrence of costs and harms that may arise out of this transaction (Lippold Rebuttal at 21).

126. DPS witness Lafferty has recommended that FairPoint be required by the Board to compensate wholesale customers for costs that they will be forced to incur as a result of the proposed merger transaction (Lafferty Direct at 38-39).

127. FairPoint has refused to compensate wholesale customers for the internal costs that they will incur on software, equipment, internal training, e-bonding work, point code change work or other costs that are directly caused by its proposed transaction and changeover from existing Verizon systems to new FairPoint systems Lippold Rebuttal at 19).

## B. DISCUSSION

Interconnecting carriers will incur costs to modify software and equipment and conduct internal training. Even more complicated work efforts necessitated by this transaction, such as e-bonding work and point code changes, which FairPoint admits will occur, result in additional costs for wholesale customers that would not be incurred in the absence of this transaction. FairPoint should be required to reimburse wholesale customers for these costs pursuant to a merger condition in order to avoid impairment due to the proposed transaction. Indeed, FairPoint's competitors are incurring costs even before the Board approves the transaction. They are being asked by FairPoint to assume that the proposed transaction will be approved, participate in system testing and take steps to ready for new systems, without any reimbursement from FairPoint.

In addition, wholesale customers face enormous risks of harm in the event of a lengthy transition period before cutover-when orders must be limited or stopped- and a poorly executed cutover that results in service-affecting problems. FairPoint has refused to reimburse wholesale customers for any harms that they incur as a result of the proposed transaction and cutover activity. FairPoint's witness, Mr. Lippold, claimed that wholesale customers already have remedies in the event of such harms. Yet, it is clear that Mr. Lippold had not really considered whether such remedies actually exist or if they would be sufficient. For example, when questioned about these already existing remedies, he testified that a harmed wholesale customer could file a complaint with the Board and seek relief. He admitted that he had not determined whether the Board has any authority to award damages to a harmed wholesale customer (Tr. 9/17/07 at 33:3-25, 34:1-25, 35:1-14; Exhibit NECTA/CPVT-Cross-12). In fact, the Board lacks such authority absent an express statute conferring such authority.[24] Similarly, Mr. Lippold was not familiar with potential claims by FairPoint that its liability to a harmed wholesale customer would be limited under the terms of an interconnection agreement.[25] Nor is the PAP an adequate remedy under the unique circumstances presented here and was not designed to deal with a flash cutover to an entirely new set of systems.[26]

The Board has authority, however, to impose merger approval conditions to assure that no obstruction or impairment of competition results for the proposed transaction. Thus, the Board is free to impose conditions to safeguard competition beyond the terms of the PAP or any other existing remedies that it may deem to exist, but which may be insufficient to address the

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[24] *Green Mountain Power Corporation v. Sprint Communications,* 172 Vt. 416 (2001).

[25] NECTA and CPVT do not concede that such a limitation on liability provision would apply, but they expect that FairPoint would claim that its liability was limited by this type of provision. (Exhibit NECTA/CPVT Cross-54-see adopted Global NAPS, Inc. interconnection agreement at 14-15).

[26] Exhibit Board-2. The PAP divides up Verizon's exposure by category of wholesale service (e.g., resale, UNE, interconnection and other). Further any exposure related to Methods of Entry (MOE) results in bill credits paid into the Universal Service Fund, not to competitors (Exhibit NECTA/CPVT Cross-2).

substantial harms and risks of harms arising out of the proposed transaction that would obstruct or impair competition.[27]

For these reasons, NECTA and CPVT recommend that the Board require to reimburse wholesale customers for costs that they incur in connection with software, hardware and internal training reasonably required in order to ensure that their systems will be interoperable with the new systems of FairPoint. Such costs shall include, but are not limited to, costs related to e-bonding and point code activity required as a result of this transaction. In addition, the Board should adopt Mr. Ball's recommendation related to compensation for any damages suffered by competitors in the event of a material failure of FairPoint's new OSS systems (Ball Direct at 12, 13).

## IX. POLE ATTACHMENT RATES SHOULD REMAIN UNCHANGED DURING THE TERM OF THE AMENDED INCENTIVE REGULATION PLAN, THROUGH DECEMBER 31, 2010, AS REQUIRED UNDER THE TERMS OF THAT PLAN

### A. FINDINGS OF FACT

128. Verizon currently operates under an amended incentive regulation plan, under which rates for its tariffed services remain frozen through December 31, 2010, unless the amended incentive regulation plan is terminated prior to that date, and with some exceptions for new services (Order Adopting Amended Plan, Docket Nos. 6959 and 7142 (April 27, 2006).

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27 The Board has stated that "...we never have considered the PAP to represent the sole mechanism for ensuring adequate wholesale service quality." *Order re Changes to Verizon's Performance Assurance Plan,* Docket No. 6255 (April 15, 2004) at 10.

129. The terms of the amended incentive regulation plan apply to "any and all products and services that have approved intrastate tariffs on the commencement date of the Plan" (Appendix B, as amended, II-A) (Pelcovits Direct at 60:5-11).

130. Verizon's pole attachment rates, terms and conditions are tariffed services approved by the Board as of the commencement date of the Plan (Pelcovits Direct at 59:16-20; 60: 1-2, 5-19; 61:1-11).

## B. DISCUSSION

The Board should make findings and rulings that FairPoint must adhere to Verizon's pole attachment rates, terms and conditions, which are tariffed and subject to review by the Board. The Board approved Verizon's current pole attachment rates by Order dated July 16, 2002, in Docket No. 6607. The Board issued Orders in Docket No. 6553, on October 22, 2003, and June 17, 2004, which established pole attachment terms and conditions to be included in Verizon's tariffs. Both the DPS and NECTA were parties in these proceedings.

FairPoint has committed to adopting Verizon's pole attachment rates, terms and conditions at closing. FairPoint also has made a commitment to accept the amended incentive regulation plan approved by the Board in Docket No. 6959 in its Order dated September 26, 2005, as amended by Order entered on April 27, 2006.[28]

Because the terms of the amended incentive regulation plan apply to "any and all products and services that have approved intrastate tariffs of the commencement date of the Plan" (Appendix B, as amended, II-A). FairPoint therefore is required to treat pole attachment rates and terms as covered under the incentive regulation plan. FairPoint did not dispute this

[28] Nixon Direct Testimony at page 25: 3-7.

conclusion in its rebuttal testimony or during cross examination. The Board should impose a clarifying condition that FairPoint is bound under the amended incentive regulation plan to maintain existing pole attachment rates through December 31, 2010) (Pelcovits Direct at 60:5-19, 61:1-11).

## X. AS A CONDITION FOR APPROVAL OF THE PROPOSED MERGER TRANSACTION, FAIRPOINT SHOULD BE REQUIRED TO CREATE AND ADEQUATELY STAFF A POLE AND CONDUIT LICENSE SERVICES ADMINISTRATION GROUP COMPARABLE OR BETTER THAN THE VERIZON LICENSE SERVICES ADMINISTRATION GROUP

### A. FINDINGS OF FACT

131. FairPoint did not commit to maintaining a License Services Administration Group or similar functional organization, but stated that it "intends to provide comparable services, such as Verizon's current LSAG, in Vermont" (Exhibit NECTA/CPVT Cross-45).

132. FairPoint was unable to explain how attaching entities will be billed for pole and conduit attachments and related make ready survey and make ready work (Exhibit NECTA/CPVT Cross-46).

133. FairPoint was unable to commit to maintaining private rights of way currently held by Verizon or explain whether it will maintain the Master Right-of-Way Licensing and Apportionment Agreement currently used by Verizon for existing licensees and parties requesting future attachments (Exhibit NECTA/CPVT Cross-47).

134. FairPoint has not determined how it will handle existing conduit licenses between Verizon and attaching entities, whether these licenses will be assigned and what forms it will use or assume (Exhibit NECTA/CPVT Cross-48).

135. FairPoint has not prepared detailed plans or explained what steps it will take to assure that the proposed transaction will not have adverse cost or timing impacts on any pending aerial or conduit location license applications (Exhibit NECTA/CPVT Cross-49).

## B. DISCUSSION

NECTA and CPVT recommend that the Board require as a merger condition and among FairPoint's cutover readiness criteria the establishment, staffing and training of a license services administration group that handles the functions provided by Verizon's existing License Services Administration Group.

The above requirement is needed in order to insure that FairPoint is capable of administering the pole attachment tariff that it has assumed and that it can carry out, in accordance with the Board's pole attachment rules, Verizon's obligation relating to the receipt of requests for attachments, the timely conduct of make ready surveys and make ready work and the performance of outside plant work that impacts attaching entities (Pelcovits Direct at 61:8-11, 15-21; 62: 1-2). FairPoint must develop the capability of managing the large amount of paper records that Verizon will be providing to FairPoint.

Attaching entities depend upon joint pole owners such as Verizon in order to deliver service to customers and make any line extensions required by the Board. Any drop of performance by FairPoint would have an adverse impact upon the public good and also could obstruct or impair competition to the extent that FairPoint adversely affects existing attachments or impedes the expansion of the availability of services offered by attaching entities.

Because of the importance of this issue to facilities-based competitors, NECTA and CPVT recommend that the establishment, training and readiness of a license services administration group be regarded as one among other cutover readiness criteria and not merely a matter for complaint proceedings if FairPoint is unable to meeting ILEC pole owner performance obligations after cutover.

The Board also must require FairPoint, as a merger condition, to continue the use of the administrative forms and procedures now used by Verizon (Pelcovits Direct at 61:15-21; 62:1-2). The Board also must require FairPoint, through a merger condition, to maintain the existing means through which attaching entities have obtained and will retain and obtain the right to use easements and rights of way.

The terms and conditions for pole attachments are contained in the Verizon tariffs that FairPoint has agreed to assume (Pelcovits Direct at 59:16-20, 60:1-2). These terms and conditions were fully litigated by NECTA, DPS and Verizon in Docket No. 6553.

## XI. THE PROPOSED TRANSACTION SHOULD BE CONDITIONED UPON RATEMAKING CONDITIONS APPLICABLE TO ANY FUTURE ATTEMPT BY FAIRPOINT TO CHARGE RATEPAYERS FOR CAPITAL COSTS ASSOCIATED WITH ITS CAPGEMINI AGREEMENT SYSTEMS DEVELOPMENT

### A. FINDINGS OF FACT

136. FairPoint witnesses Haga and Nixon stated that FairPoint would not seek to recover from wholesale ratepayers or attaching entities the Capgemini charges to FairPoint (Exhibits NECTA/CPVT Cross-30, 44).

137. In rebuttal testimony, FairPoint witness Skrivan contradicted the prior statements made by other FairPoint witnesses and stated that FairPoint reserved the right to seek to recover in future rate filings the capitalized portion of Capgemini charges to FairPoint (Skrivan Rebuttal at 20, 21).

138. FairPoint witness Skrivan refused to defer seeking such rate recovery from wholesale customers prior to seeking such rate recovery from retail customers (Tr. 9/7/07 at 167:14-21).

## B. DISCUSSION

After having committed in discovery not to pass through Capgemini-related costs to wholesale ratepayers and attaching entities (Exhibits NECTA/CPVT Cross-30, 44), FairPoint has backpedaled on its commitment and asserted the right to seek rate recognition of these costs from both retail and wholesale customers (Skrivan Rebuttal at 20, 21).

Wholesale customers should not be disadvantaged by FairPoint's imposing additional costs on them during a period of time when FRP cannot increase retail rates based upon the rate recognition of these costs under the incentive regulation plan. Such gamesmanship would obstruct or impair competition by loading costs on wholesale customers alone. In order to promote the public good and prevent the obstruction or impairment of competition, the Board should condition any merger approval upon the following requirements:

1. FairPoint shall not seek wholesale rate recognition of capitalized Capgemini costs prior to its seeking rate recognition from retail customers;

2. Capitalized Capgemini costs should be allocated among the Northern New England States service areas now served by Verizon and any other jurisdictions or service areas that benefit from these new systems;

3. Capitalized Capgemini costs should be allocated between regulated and non-regulated services

FairPoint does not appear to disagree that any future rate filing seeking recognition of these costs would need to comply with these basic cost allocation requirements set forth in recommendations 2 and 3 above (Tr. 9/7/07 at 168-169).

Such conditions would help avoid an impairment of competition and also promote the public good by assuring that FairPoint is committed to adhering to these basic requirements, thereby simplifying any future rate filing by FairPoint in which it seeks rate recognition for these costs.

## XII. FAIRPOINT SHOULD BE PRECLUDED BY MERGER CONDITION FROM SEEKING RECOVERY FROM RATEPAYERS OF ANY TSA-RELATED EXPENSES, ANY ACQUISITION PREMIUM AND THE EXPENSED PORTION OF CAPGEMINI'S WORK

### A. FINDINGS OF FACT

139. FairPoint witnesses have committed that FairPoint will not seek to recover from ratepayers any TSA-related expenses, any acquisition premium and the expensed portion of Capgemini charges (Exhibits NECTA/CPVT-MDP-7, 8 and 9).

140. Other witnesses have recommended that the Board preclude FairPoint from seeking recovery of these expenses from ratepayers (Campbell Direct at 47; Pelcovits Direct at 17:14-19, 18:1-12; Exhibits NECTA/CPVT-MDP-7, 8 and 9).

### B. DISCUSSION

FairPoint's commitment that it will not seek to recover from wholesale and retail ratepayers any expenses paid to Verizon under the TSA, any expensed portion of payments made to Capgemini and any acquisition premium associated with the proposed transaction must be made merger approval condition by the Board so it remains a binding and enforceable obligation of FairPoint and to ensure that ratepayers do not pay more than they would have paid in the absence of this transaction (Pelcovits Direct at 18:6-12).

Recovery of these expenses from ratepayers would be unreasonable. Ratepayers are paying for the cost of Verizon's provision of services through existing rates that will be in effect during and after the expected term of the TSA. The disallowance of the recovery of acquisition premiums is a common merger condition.[29]

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[29] *See*, e.g., *Joint Petition for Approval of Waitsfield-Fayston Telephone Company, Inc., and Champlain valley Telecom, Inc,* Docket No. 6171 (December 14, 1998).

# CONCLUSION

For the reasons stated above, the Board should not approve the proposed transaction between Verizon and FairPoint unless it adopts as merger conditions the conditions and requirements recommended by NECTA and CPVT in their Initial Brief. NECTA and CPVT do not oppose the Board's imposing additional conditions upon any approval of the proposed transaction as it deems necessary in order for it to find that the proposed transaction would promote the public good and not obstruct or impair competition in Vermont.

Respectfully submitted,

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